IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

NORMA R. BROIN, et al.,

Plaintiffs,

vs. CASE NO. 91-49738
CA 22

PHILIP MORRIS COMPANIES,
INC., et al.,

Defendants.
_____/

TRIAL

VOLUME 46

TRANSCRIPT OF PROCEEDINGS in the above-styled cause before the Honorable Robert Paul Kaye, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Tuesday, July 15, 1997, at 1:30 p.m.

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THE COURT: Have a seat. Thank you. Everybody ready?
MR. MOSS: Yes, sir.
THE COURT: All right. Let's bring in the jury.
(Thereupon, the following proceedings were had in the presence of the jury:)
THE COURT: Thank you, folks. You may be seated. Everybody have a satisfactory lunch? Let's put it this way: not wonderful, satisfactory. Ready to go to work? All right. Counsel.
MR. WHITING: Good afternoon. I want to turn now to talk to you about what the evidence will show about epidemiology. It's a word that plaintiff says often. It's a word that sounds a little bit like a disease, and I'll be very honest with you, it's not easy stuff, but it's very important to this case, and indeed, the evidence will show that the epidemiology is the science that determines the issues in this case, and the evidence will show that with respect to ETS and disease, whether that is lung cancer or heart disease or respiratory illness, or any of the other diseases on plaintiff's laundry list, the evidence is not there.
Now, you heard plaintiffs tell you that their experts will talk about the 1986 Surgeon General report, but it will be apparent from the evidence that plaintiffs are really relying on the 1992 report of the Environmental Protection Agency, what Mr. Hardy called the EPA report.
The evidence will show you that neither the EPA nor the Surgeon General did any original research. None. They relied instead on statistical studies done by others. And so as I indicated earlier, plaintiffs' claim that ETS causes lung cancer is based fundamentally on those numbers, statistics, what are called associations.
Now, the statistical approach is really an attempt to use numbers to match up some factor, whether it's ETS or whether it's exercise or whatever it is, but some factor with whether or not people get disease. That's what it's all about. It's just about looking at numbers and seeing whether there's an association, a relationship between the factor that they are trying to study and a particular disease.
The epidemiology--excuse me--the evidence will show you, in fact, that epidemiology can't tell us anything about why a particular person got a disease. And the evidence will be that there is no,

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no epidemiological study showing any connection between flight attendant exposures to ETS and any disease. No such epidemiological study.

But the evidence will also show you that statistical associations, numbers, can be very misleading. What the experts will tell you, in a couple of examples to try to make that point, is that, for example, people who visit a doctor have more diseases than other people. That's not because going to a doctor makes you sick; it's because people who are sick go to a doctor more often than people who aren't sick.

And the experts will also tell you about another example. There is a statistical association between smoking cigarettes, active smoking, and cirrhosis of the liver. But no expert says that smoking causes cirrhosis. What happens is that the studies show that people who drink, alcoholics, people who get cirrhosis, smoke more often than others, but alcoholics also have very poor diets and it's the poor diet that causes the cirrhosis. So the evidence will show that epidemiology can be very misleading.

Now, what epidemiology does, the evidence will show you, is it looks at samples of groups of people, not individuals and not entire populations. An example, one of the experts will talk about, is suppose an epidemiologist wanted to study whether saccharin in Sweet 'N Low can cause cancer. He or she would compare two groups. The sample group that uses Sweet 'N Low would be compared to another group that didn't use Sweet 'N Low, and the epidemiologist would compare the number of people who got sick in the two sample groups to see if the ones that use Sweet 'N Low got more of the disease he was studying than the ones who didn't.

This is a very important point about epidemiology. It isn't comparing people who get ill because of an exposure to no illness. It's comparing two groups of people: one who has an exposure and how many of them got the disease, to another group that don't have any exposure but still got the disease. So it's a comparison of groups of people who, in fact, got sick.

Epidemiology is also focused on specific diseases. A study would be designed to see if there's an association in sample groups between using Sweet 'N Low and a particular condition like, for example, bladder cancer. But that study that will look at that association can't tell you

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anything about a connection between using Sweet 'N Low and any other condition.

Now, what the experts will tell you is that the results of an epidemiology study are reported as mathematical associations or what they call relative risks. And that's an important term, relative risk, and what they are doing is they are telling you about something that is relative, not absolute, not certain, but the relative risk in a comparison between two groups.

I'm going to try to talk to you a little bit about what the experts will tell you about relative risk, and I'm going to use a simplified example because what it's really doing is comparing rates or the frequency with which people get disease in a group that is exposed, to the frequency of rate in the group that isn't exposed, and for purposes of my example, we assume that in both groups there were the same number of people: people that have the exposure to ETS, same number of people as the people who don't. And let's assume that those that were exposed from that whole group, 115 got lung cancer. And let's suppose that in the unexposed group there were a hundred that got lung cancer.

What the epidemiologist does is compare these two numbers and he tells you that the relative risk equals 1.15, and all that is is a comparison of the relative risk for the two groups that were studied.

And what's important to recognize about all of this is that these are samples. If a scientist could take all the people in the world that were exposed and put them in one circle and all of the people in the world that weren't exposed and put them in another circle and study that, they would know exactly how many people got lung cancer and whether there was a difference or not, but they can't look at all the people in the world, and so what they do is they take a little sample from over here of people and they compare it to a little sample from over there, and then they calculate a relative risk. But what's important is if instead of that little sample they took that one and compared it to that one, the relative risk might be different. It's important to keep in mind because that's what the evidence will tell you.

Now, the evidence will also tell you that a relative risk of 1.0, if the risk comes out to be one, it means that in the particular study the number of people who were exposed and got sick, the

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rate is the same as in the people who weren't exposed and got sick, so there was no difference.

If it's below, the relative risk is below 1.0, it actually means that the people who were exposed to what the scientist is studying got less disease than the people who weren't exposed, what's called a protective effect. And you will hear scientists talk about protective effects and negative relative risks or risks below 1.0.

And if the risk is above 1.0, it means that the people who were exposed in that group had a higher rate of disease than the unexposed group.

Now, the size of the relative risk is called the strength of association, and you'll also hear a lot about that term. And what the experts will tell you is pretty common sensical, and that is, the higher it is, the stronger the relative risk, the stronger the association, the higher relative risk, the more meaningful it is.

What the experts will tell you, for example, is that the relative risk of serious lung disease for people that are exposed to asbestos has been reported by epidemiologists as 5.0. The epidemiologist will also tell you that the reported relative risk of lung cancer for a man who smokes more than a pack a day for more than 20 years may be as high as 15 or 20. But the evidence will also show that relative risks that are below two are what the epidemiologist and the experts will tell you are very weak and very uncertain. The closer the risk is to one, the less certain, the less meaningful the number is.

Now, the second thing about epidemiology that you have to keep in mind is that it deals with numbers, and therefore, there's a possibility that the thing that epidemiology compared in those samples were just a function of chance; that it just happened because of the way the samples got selected or picked. It's like if I took a coin and flipped it ten times, on average you would expect that you wind up with five heads and five tails. But supposing just one set or one sample I flip it ten times---

THE COURT: Counsel, is this what the experts are going to say or it's something you're saying?

MR. WHITING: It's exactly what the experts are going to say. It's exactly what they are going to explain.

THE COURT: I'll wait and listen. Go

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ahead.

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MR. WHITING: Suppose the coin is flipped ten times and comes up with seven heads and three tails? It doesn't mean that the coin isn't a fair coin or that it will always produce that; it means that in that one sample it happened by chance, and what the experts will tell you is that because things can happen by chance, they apply tests or ways to limit chance, statistical or epidemiological study, and they will tell you that the way they do it is with a concept called statistical significance.

I want to be honest with you, I can't tell you all the details of statistical significance and all the mathematical formulas, but what the experts will tell you, there are two important things to keep in mind. The first is that they will apply mathematical forumlas to the tests in epidemiological study to determine a range of results. Instead of a precise number, they will tell you that the range of results for a particular study may be there or the range may be there or the range may be there. So what they do is they apply--the experts will explain to you that they apply it's called a confidence level to establish a range of results for each study.

The second thing that they will tell you is that in order for a study to be statistically significant, one cannot be in the range. So the entire range must either be all below in this, and this study would be statistically significant, or the entire range must all be above, and that study would be statistically significant. But if the range, if the vertical line of the range crosses 1.0, that's not statistically significant and that study doesn't meet the scientific test.

Now, if the relative risk and statistical significance weren't enough, the scientists will also tell you there's another important concept to deal with in epidemiological studies and it's called confounding.

If you recall what I said about Dr. Coggins' rats, and what the evidence will tell you about those rats: that they were specially bread to be just as alike as possible; that they were treated exactly the same way except for the amount of ETS they were exposed to; they lived in the same kind of cages and the same place, and they ate the same kind of food, and the researchers were very careful to treat them exactly the same all the time, but an

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epidemiology study, the experts will tell you, can't be controlled like that because people aren't

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laboratory rats. They inherit a bunch of different characteristics from their parents. They eat whatever they want to. They live where they want. They have different jobs and different exposures and different lifestyles. Indeed, the evidence will show you what is obvious: People are very different. But because they are very different, it is never correct to assume that two groups of people are alike in all ways except for ETS exposure. And these differences in the groups are very important to the evidence in this case. They create, as I said, what the epidemiologists call confounding.

What confounding means in this case is that exposure, and the exposure to ETS here, is associated with one or more other factors that could account for the study's results, like cirrhosis and smoking that I mentioned to you earlier.

The scientists will tell you that if you assume that a group of people not exposed to ETS ate less high fat foods, a lot more fresh vegetables than the ETS-exposed group, the evidence will show that the scientists--excuse me--the evidence will be that the scientists have shown that a high fat diet--people who eat more fruits and vegetables get less cancer. So what you would say here is that the study is confounded.

If we go back and look, what they are really saying is if you assume that the 115 in that example was all related to ETS, you would be making an erroneous assumption because these people, the entire group, may have eaten more high fat diet, may have eaten less fruits and vegetables, and so this relative risk may have been affected or confounded by other factors that you can't sort out.

Now, the experts that will testify will tell you that confounding is critical in ETS statistical studies for two reasons. First, confounding is more important when you have very low statistical relative risks. The lower the risk, the more likely it is that something else is causing it. And second, remember what I said about the ETS epidemiological studies: They are spousal studies. They never measure ETS exposure. The study simply determined ETS exposure based on the fact that someone was married to a smoker. So they are actually studies of lung cancer risk from being married to a smoker.

The problem with that design is that it

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guarantees, the evidence will tell you, that there will be confounding. A nonsmoking woman married to a smoker lives differently in lots of ways other

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than just ETS exposure, particularly different from the way a woman married to a nonsmoker lives.

The evidence will show you that a woman married to a smoker typically will eat a different diet, including more fat and less vitamins, fruits and vegetables than a woman married to a nonsmoker. The evidence will show that a woman married to a smoker likely will drink more alcohol, exercise less, and make other lifestyle choices differently than a woman married to a nonsmoker.

Now, these differences, of course, are generalities, and for a particular individual they may not be true, but the evidence will show that they are true often enough so that as a group, women married to smokers are different than women married to nonsmokers.

And the evidence will show that this is important in these studies in evaluating them because all of these things are risk factors for disease. For example, as I said, eating a diet high in fat has been reported to be more than ten times as great a risk factor for lung cancer as ETS. So when you ask whether women married to smokers have more disease than women married to nonsmokers, you are not just evaluating ETS; you're measuring all of these other risk factors, and the evidence will show you that the risks from these other factors are so large compared to their reportedness for ETS that they simply can't be sorted out. Confounding cannot be ruled out as the reason for the risk.

Now, I want to move from that to talk to you a little bit about what the evidence will show you about the EPA's assessment of ETS.

To begin with, you should keep in mind that the evidence will show you that the focus of the EPA report is on lung cancer risks. The EPA said nothing about heart disease and nothing about any other type of cancer other than lung cancer.

The evidence will show that even as to lung cancer, the EPA did no original work. They did not design or conduct any epidemiological study of its own. Instead, it only looked at the spousal studies, and based upon those spousal studies, the EPA determined that the relative risk for lung cancer for nonsmoking women married to smokers was 1.19. 1.19.

The evidence will show how weak this

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relative risk is. The evidence will show you that the spousal epidemiological studies addressed potential risks, not causation. And the evidence will show you that the spousal studies are not

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studies of lung cancer risks for flight attendants' ETS exposures on airplanes.

Now, there are a number of other factors about the EPA report that I want to review with you, and the first is that the EPA---

MR. ROSENBLATT: Your Honor, objection. Didn't the defense make objection after objection not to go into detail about the EPA report? And all I did was touch upon it.

THE COURT: I think so. Without making reference to the contents of the report, I think that was the ruling.

MR. ROSENBLATT: Exactly, and that's what he's doing now.

THE COURT: Okay.

MR. WHITING: May I be heard, Your Honor?

THE COURT: I would much prefer going side bar.

MR. WHITING: That would be fine.

(Thereupon, counsel and the court reporter approached the bench, and the following discussion was held outside the hearing of the jury:)

MR. WHITING: The objection that we made was to the admissibility of the EPA report into evidence, which clearly, it is not admissible into evidence. It is clear, however, also that what the plaintiffs' experts will do is to rely upon the EPA report, and the evidence will show a number of ways in which we will attack how the experts rely on the EPA report. There are flaws in the EPA report which will be brought out on cross examination. They will be brought out through direct testimony of our experts and that's what I'm talking about.

THE COURT: I haven't yet determined that the EPA report and the Surgeon General's Report are not admissible.

MR. WHITING: I understand that.

THE COURT: I thought that when we started this, because of that ruling, that the plaintiff was not going to make any reference to the contents, but merely the general content of what the Surgeon General's Report said, that smoking causes cancer, and that's as far as it went with it, but now you're getting into some of the contents.

MR. WHITING: No. I'm getting into the

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flaws in it, and what it does or does not include, Your Honor.

THE COURT: That's not much of a difference.

MR. FURR: What Mr. Rosenblatt said

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yesterday about the EPA report was that the EPA determined that ETS exposure is a cause of lung cancer in nonsmokers and the EPA determined that environmental tobacco smoke is a Group A carcinogen, and that the EPA determined that environmental tobacco smoke causes 3,000 deaths per year in nonsmokers. He made all those statements.

Now, if we are in a tenable position that if we cannot address the flaws that underlie that analysis in our opening statement---

THE COURT: Well, it's just opening the door wider and wider and wider. It's all right with me if that's what you want to do. You're opening the door and you're doing it.

MS. ROSENBLATT: Then it's in.

MR. FURR: This has nothing to do with admissibility.

MR. ROSENBLATT: You want to bet?

MR. WHITING: As I indicated to you, what I want to talk to you about is what the evidence will show about the EPA report.

The first thing that I want to talk to you about is that the EPA did not consider work place studies. What the evidence will show you is that there are studies examining whether or not a nonsmoker who worked in an environment where smoking was allowed has any increased risk of lung cancer compared to a nonsmoker who worked in a place where smoking was not allowed.

The work place studies are important because this case is about flight attendants' exposures to ETS while they were working on airlines.

The evidence will show that the work place studies taken together show no risk of lung cancer associated with working in a place where others smoke. The work place studies looked at people whose ETS exposures were more like flight attendants. As I said, the evidence will show that the exposure levels in a typical work place were greater than but still closer to what flight attendants' exposures were, and the evidence will show that the work place studies examined people with ETS exposures closer to flight attendants and that they produced no risk. The EPA did not include or rely upon those studies in its analysis.

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The second thing the EPA didn't do is it omitted studies. The evidence will show that, in fact, the EPA carefully selected certain studies or certain results from the spousal epidemiologic studies and made statistical adjustments to those results to produce the weak association it found for

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lung cancer in people married to smokers.

But even though the EPA ignored the studies that didn't conform to their conclusions, they still could produce more than a relative risk, but what the experts will tell you is that the only way to evaluate the scientific information on ETS and lung cancer is to look at all of the studies. And if you combine the new studies that have come out since the EPA report with the studies that the EPA knew about in 1992 when it issued its report but didn't include with the studies that in fact the EPA did consider, the evidence will show that when all of the studies are properly included in the analysis, there is no risk. None.

In addition, the evidence will show you that the EPA took the spousal studies that it looked at at face value. And what the experts will tell you is that in an epidemiological study people are asked all kinds of questions: "How old are you? What kind of job do you have? Do you eat fruits and vegetables? Do you live with a smoker? Do you smoke? Do you exercise regularly?" And what the experts will tell you is that all that information is gathered into a database, and you will hear evidence about some of the database from ETS epidemiological studies that were funded by the federal government.

Those databases show that the most important factors for whether a nonsmoker gets lung cancer are dietary factors. ETS does not even range in the top ten of the factors observed in these studies.

The other thing that experts will tell you is that there's an important concept in understanding epidemiological studies and it's called dose response, and that's a pretty common sensical concept, the experts will tell you, and what it means is if you're going to have a meaningful result from an epidemiological study, you should see what is called a dose response. You should see that as the exposure, how much the dose goes up in the number of people, the rate of disease should go up with the dose. If you don't have a dose response, if you don't see in your study that as to how much the dose goes up the number of people

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or the rate of disease always goes up, then it's a

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reason to believe that the epidemiological study is not showing you a real relationship.

What the evidence will show you is that the EPA's own guidelines acknowledge the importance of finding a dose response relationship for trying to determine that a cause causes disease.

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What the evidence will show you is the problem with the EPA is the spousal studies don't show a dose response. So what did the EPA do? It changed the rules. It used what is called a trend test in place of a true dose response test. What a trend test doesn't measure is dose response and it isn't a substitute for dose response analysis. None of the studies replied upon by the EPA do a statistically significant dose response relationship. Indeed, the evidence will show you that several studies actually produced reverse relationships: Higher reported levels of spousal smoking associated with apparent lower risk of lung cancer. This makes no sense, and of course, it is wrong.

The evidence will show that the lack of any dose response relationship is another factor showing that there's no valid basis for the EPA's position.

Now, you'll recall a few minutes ago that we were talking about statistical significance, and it's important to determine whether chance explains the results of an epidemiological study. The evidence will show that 80 percent of the studies the EPA relied upon were not statistically significant, so what the EPA did again is it re-analyzed the studies and again it changed the rules.

This time, the evidence will show you that they lowered the bar. Like widening the goal posts for a football kicker or bringing in the fence for a baseball hitter, they changed the rules. They doubled the possibility that the association is simply a chance random and meaningless event, but even after lowering the bar, the EPA did not get a statistically significant overall association.

Finally, what the evidence will show is that because of the weak associations in the spousal studies, the EPA needed another technique to reach its conclusion, so it turned to what is known as a meta-analysis.

What the experts will tell you is that is just another statistical term for taking the results of certain studies and combining them to make one

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number. But the evidence will show that there are four major problems with the EPA's meta-analysis.

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First, there are well-recognized criteria that you must use when you try to combine a bunch of little studies into a large result. The most important principle the experts will tell you is that the studies have to be like each other. They have to be designed and conducted and analyzed in a

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similar way. It's like a way of saying you can't combine apples and oranges. But the evidence will show that the ETS studies were, in fact, different in important ways. They were studies of different groups at different times. The exposures were determined differently, and almost certainly were determined differently for different groups. There were different attempts to control for confounders. The way the studies were designed was inconsistent.

There were other design differences as well. Some of the studies started with healthy people and went forward looking to see if they got disease. Other studies looked at people that already had contracted lung cancer and tried to reconstruct historic exposures. And different studies, even different with what it means to be a nonsmoker. Some of the studies treated a former smoker as a nonsmoker. Some of the studies treated former smokers as smokers.

In short, the EPA, the evidence will show you, just didn't combine apples and oranges; what the experts will tell you, it's like they combined apples, oranges, grapes and got a mixed fruit salad which they then called a better apple.

But there is more. The EPA didn't combine all the studies. It left out three that it knew about would have made a difference.

In addition, the evidence will show many selective studies the EPA did combine. In them, they consistently cherry-picked high risks that tended to support their conclusion.

Finally, the evidence will show you that they used an inappropriate statistical method to combine all the studies that underestimated the certainty of the analysis.

In short, the EPA meta-analysis presumed a conclusion. It was a set-up. The evidence will be that had the EPA done any number of proper things, used a better model, used all of the data, properly adjusted for confounding, the EPA meta-analysis would have shown no statistically significant risk.

I want to talk just briefly about two other

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subjects or two other areas of epidemiology, and I'll just touch briefly on them. The first is heart disease. The plaintiffs have said that part of

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their case is to focus on heart disease as well as lung disease. The evidence will show that the epidemiological studies that have tried to look at the risk of heart disease among women married to smokers do not and cannot show that ETS causes heart disease. Heart disease is what is called, what the

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experts will tell you, multi-factorial, and what it means to say is that a disease is multi-factorial is that a lot of different things can be responsible for the disease.

The experts will tell you that more than two hundred items had been identified as risk factors for heart disease. Risk factors for heart disease include cholesterol, high blood pressure, high fat diet, lack of eating fruits and vegetables, diabetes, stress, lack of exercise and many, many more. But the small epidemiological studies like most of those focused on heart disease can't control for all these risk factors. Studies that report very small risks can't possibly rule out these other risks as an explanation for a statistical association.

What the evidence will show you is there's no consistent evidence that ETS causes heart disease. Indeed, what the evidence will show you is that the largest study, the one that does the best to control for the numerous other heart disease risk factors, shows no increased risk from ETS at all. No risk.

Flight attendants, the plaintiffs, also say that they are going to focus on respiratory diseases, but there will be no evidence that flight attendants suffer from respiratory problems any more frequently than you or I do.

The evidence will show you that people get allergies, occasionally cough or sneeze, have watery eyes, and sometimes get a little more serious where we get a respiratory infection like bronchitis.

You will also hear evidence that ozone in the airline cabin causes these same symptoms, but there's another factor plaintiffs didn't talk about. The evidence will show that the problems that flight attendants are blaming on ETS are the same problems that flight attendants complain about to their doctors today, nine years after the Federal government first decided to ban smoking on certain flights in the United States.

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Can ETS be annoying? Of course. But the evidence will show that there is no scientific or medical reason to expect that flight attendants will suffer from respiratory effects due to ETS exposure.

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What the doctors will tell you is only when a person's defense mechanisms are overwhelmed can chemical exposures cause respiratory diseases. There is no evidence that ETS causes asthma, allergies, bronchitis, emphysema, or any other lung disease in a healthy nonsmoker.

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Last thing that I want to talk to you about--I know you'll be glad to know that I'm near the end--is to tell you what the evidence will show you about the companies' efforts to change cigarette designs and to work on cigarette designs over time.

The evidence will show that these companies have worked very hard and continue to work hard today to make the best possible product just like any other company that produces a legal product.

To respond to the scientific criticisms and consumer demands to make the best cigarette that people will buy, the evidence will show that all of the companies have researched literally thousands of potential innovations and marketed hundreds of them. These innovations include sufficient filtration, reconstituted tobacco sheets, expanded tobacco, air dilution, and even heating rather than burning tobacco. As a result, the evidence will show that the tar and nicotine levels of all cigarettes have been greatly reduced over time, and some products, the tar and nicotine as been practically eliminated.

But there's another important concept that the evidence will show about the design process, and you will hear company people tell you and you will learn that cigarette products are not different than any other, and they involve what the engineers or designers call design trade-outs, that is, any one design choice affects other parts of a design. And this rule applies to cigarettes as well as other products.

As the evidence will show you, engineers could design a car that would eventually virtually eliminate all risks of serious injury. This could alter steel to strengthen the car's integrity in collisions, lower the center of gravity so that it wouldn't roll over. Pretty soon what they would have is not a car, but a tank. It would protect the occupants much better and it still could be called transportation, but it wouldn't handle well. It would cost as much as a hundred times what a car

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costs and no one would buy it. And if no one buys it, then it really isn't a car and it isn't worth making.

The last point is important. As long as our government still allows people to make a choice to

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smoke, a cigarette no one will buy is no different from no cigarette at all. As the evidence will show, if a newly-designed cigarette will not be purchased by smokers, then the new design is of no value to anyone.

And so, what the evidence will tell you

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about these companies is that they have attempted to design their product in a way that smokers would accept, and they looked at hundreds of alternative theories and designs, and included design changes that addressed ETS issues.

MR. ROSENBLATT: This is clear argument, Your Honor, and I would object to it.

THE COURT: It walks the fine line. He prefaced with the exact fact that the evidence will show. Well, it better. Go ahead.

MR. WHITING: Thank you, Your Honor.

The evidence will show you and you will hear from company scientists about the ways that they have explored modifications of cigarettes to reduce sidestream smoke, to reduce its odor, and to reduce ETS. They looked at things like modification of cigarette paper, the use of tobacco substitutes, filters, and the addition of flavorant and aroma compounds.

For example, the evidence will show that in the 1980, R.J. Reynolds had introduced a cigarette that would reduce sidestream smoke, and developed and patented several areas of design technology for reducing sidestream and enhancing cigarette aromas.

The evidence will also show you that from 1983 to 1989, other Reynolds' projects contributed to the company's knowledge regarding the ability to develop a low sidestream product that would obtain consumer approval.

And in 1988, Reynolds introduced Vantage Excel in a test market. That cigarette significantly reduced visible sidestream smoke, but like the design process, it didn't fare well in the marketplace, and it was therefore discontinued.

The evidence will also show during the same period Reynolds' competitors were working independently to make their own design changes. Brown & Williamson, for example, tested various cigarette papers. They experimented with ashes to

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reduce the odor associated with secondhand smoke and tested expanded tobacco and blends that would reduce the total amount of ETS.

The evidence will show from these design people at the companies that the most fundamental change in cigarette design that reduced ETS was to

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burn less tobacco. Burning less tobacco obviously creates less environmental tobacco smoke.

B&W introduced Capri, a thin cigarette like Excel and Virginia Super Slims, that burns less tobacco. These design changes reduced the amount of ETS from smoking these products.

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In addition, the evidence will show that in 1986, Reynolds outlined a proposal for a product which smokers could use anywhere without a prescription. It was designed to do that, to deliver good taste and to be conventional in appearance and cost-competitive with conventional cigarettes. The new product was designed to heat tobacco, not to burn it. The experts will tell you that it looked like a cigarette, but didn't burn like one. It had no ash. Tobacco was not burned up compared to conventional tobacco-burning cigarettes. It reduced specific components of mainstream and sidestream by an average of 90 percent. It reduced ETS levels from 65 to a hundred percent, and it reduced mainstream and sidestream smoke which was much simpler in chemical composition than from conventional cigarettes. But, again, it wasn't successful in gaining consumer acceptance.

The evidence will show that Reynolds continued to do work to develop a less sidestream product, a product that consumers will accept, and it culminated into the development of Eclipse in 1986, a cigarette that is currently being test-marketed in certain regions.

The evidence will show that in order to overcome some of the problems that exist with Premier, Eclipse uses a very small amount of tobacco in the heat source, and in that way it is much like other cigarettes on the market today, but for purposes of this case, the key characteristic is almost a 90 percent reduction in ETS.

The evidence will show you that like the companies' efforts of basic research, the design work that companies have done demonstrates that they have taken the ETS issue seriously. Like their basic research efforts, the companies are consistent with the fact that they are competitors in a very competitive business, published their design work,

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and as I said at the beginning, understanding ETS is not simple. The evidence will show the companies have worked hard, they have worked hard at it, and contributed dramatically to the scientific knowledge about ETS.

The evidence will show you these companies helped people understand what it is, what it isn't,

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how to measure it, how much of the people actually breath, and whether it's harmful.

The evidence will show you that the smoke from passengers that chose to smoke in airplanes produced tiny real ETS exposures to flight attendants. Those exposures did not cause flight

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attendants to get sick. There is no evidence that flight attendants get more of a disease as plaintiffs claim than the rest of us.

I want to thank you for your attention, and I want to remind you that we go second and ask you to hear all the evidence, and on behalf of my clients and the other defendants, I want to thank each of you for taking the time away from your regular jobs and your homes to serve as jurors, and the role is an important one.

THE COURT: No need for that.

MR. WHITING: Thank you, Your Honor.

THE COURT: Who is next?

MR. FAY: Me, Your Honor.

THE COURT: Yes, sir.

MR. FAY: Your Honor, counsel, ladies and gentlemen of the jury. My name is Michael Fay, and I'm an attorney representing two of the defendants in this action, Liggett Group, which you heard a little bit about already, and Brooke Group.

Although there's been some introductions already made, I wanted to make those introductions again just so that you understand who is here on behalf of Liggett.

I have two colleagues in the courtroom who will be assisting me during this trial: Ms. Marie Santacroce and Ms. Kelly Luther. The three of us or some combination of the three of us will be here in the duration of this trial representing the interests of Liggett and Brooke.

The evidence in this case will show that Liggett is a small tobacco company. It's based in Durham, North Carolina. In fact, Liggett is the smallest of the five cigarette manufacturers that have been sued in this action with less than two percent of the market in the United States for cigarettes.

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Brooke is a company that owns Liggett. Sometimes you refer to it as a parent company, and Brooke is a company based right here in Miami, Florida. So we have Liggett Tobacco Company, and Brooke, the company that owns all of the stock in Liggett. And Brooke is here in Miami.

Yesterday, in his opening statement, Mr. Rosenblatt said something. He said, "Liggett is

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different," and the evidence in this case will prove that overwhelmingly.

Liggett is different. Very early in this case you are going to hear testimony from a Mr. Bennet LeBow. He's already been mentioned. He's the chairman of Brooke, the parent company, and

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he's a director of Liggett.

Mr. LeBow will tell you that Liggett, in an effort to be a more responsible manufacturer of cigarettes in this country, has publicly stated and acknowledged that smoking causes lung cancer; not that it's a risk factor, but that it causes lung cancer.

Mr. LeBow will also tell you that Liggett, in an effort to be a more responsible corporate citizen in the 1990s, has publicly stated and acknowledged that cigarette smoking causes heart disease and emphysema. And again, it's not a risk factor, but a cause.

Mr. LeBow will also tell that you Liggett, in an effort to be a more responsible cigarette manufacturer, has publicly stated and acknowledged that smoking is addictive. In fact, Liggett has agreed to add to its cigarette packs and has added to its cigarette packs a warning: Smoking is addictive.

The evidence in this case will show that for Liggett and Brooke there is no debate on these issues; there is no need for more research.

In making these public statements, Liggett and Brooke and Mr. LeBow personally changed their position. That's what happens when a company takes a new position. They change their position. We concede that. Mr. LeBow will tell you that Liggett and Brooke and he, personally, are proud that they changed their position. He will also tell you that Liggett and Brooke and he changed their position because in the 1990s, it was the right thing to do.

There will be other evidence in this case that will show you that Liggett is different. And you heard some of it yesterday. During his opening, Mr. Rosenblatt conceded that in the issuing of the

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1954 Frank Statement to smokers, Liggett wasn't involved. It's also the case that the meetings that were held at the Plaza Hotel in New York City leading up to the issuing of that Frank Statement, we weren't at those meetings.

Liggett wasn't involved in the formation of the Tobacco Industry Research Committee. Liggett is not a member of the Council for Tobacco Research, has not been a member for decades. It was a member

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for just a few years in the ’60s.

Liggett is not a member of the Tobacco Institute, which Mr. Rosenblatt referred to a couple times yesterday, and Liggett is not a party to the lawsuit brought by the tobacco industry against the United States Environmental Protection Agency.

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The evidence will show that Liggett is different and Liggett has been different. I don't remember who said it, but one of the attorneys made the comment that one of the issues in this case is did the companies behave properly. We submit the evidence will demonstrate that Brooke and Liggett have behaved properly.

Now, the issues -- the ultimate issues in this, as all these other attorneys have told you, and I'm not going to go over them again, believe me, involve secondhand smoke, airlines and flight attendants. On these issues, we simply don't know.

There's going to be a lot of evidence, and on behalf of Liggett and Brooke, I would ask you to listen to all that evidence. There's going to be a lot of testimony. And on behalf of Liggett and Brooke, I would ask you to listen to all of that testimony. Weigh that evidence, weigh that testimony and render the best verdict you can.

Thank you.

THE COURT: Anyone else?

MR. MOSS: Your Honor, may we have about a three-minute break?

THE COURT: Three minutes.

MR. MOSS: Three minutes, and I can tell you if there's something else.

THE COURT: All right.

MR. MOSS: If there's something else --

THE COURT: I understand.

MR. MOSS: -- I can also assure you it's short.

THE COURT: It's going to take longer than three minutes, obviously. It takes that long to get you into the other room and back out of here. So go ahead in the other room.

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Just relax. Do not discuss the case. Do not make up your minds about anything. Just sit back and relax. We'll be with you shortly.

(Thereupon, the jury was excused from the courtroom.)

THE COURT: Counsel, Mr. Moss, you need some time, five, ten minutes, and then you want to discuss something with the Court?

MS. LUTHER: Maybe yes; maybe no.

THE COURT: Maybe; maybe not.

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Go ahead and do that, and we'll have to come back and discuss what to do with the jury.

(Whereupon, a short recess was taken from 2:34 until 2:50 p.m.)

THE COURT: All right. Anything else?

MR. MOSS: I'm not sure if you can live

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with this decision, but we're not going to have anything else.

MR. ROSENBLATT: Can I have rebuttal, Your Honor?

THE COURT: If you can think of something to rebut.

MR. ROSENBLATT: Oh, absolutely. I was right, everything I told you yesterday.

MR. COFER: Two wrongs don't make a right.

MR. ROSENBLATT: Sometimes they do.

THE COURT: All right. It's ten to 3:00, and I doubt seriously if we're going to get into evidentiary matters at this point.

We do have other matters to discuss, so let's take the balance of the afternoon to talk about that and get that work out of the way. So I'll get the jury out here and release them.

Why don't you collect the clipboards.

Bring in the jury.

(Thereupon, the jury entered the courtroom.)

THE COURT: Don't get too comfortable. Sit, but don't get too comfortable. There's always good news and always bad news in every situation.

Have a seat, folks, please.

The good news is right now, the opening statements are over and completed. The bad news is we're going to have to send you home for the rest of the afternoon.

Well, all right. That went over like a lead balloon.

Really, we have a lot of work to do, the lawyers and I, which does not require your presence here. So we're going to take advantage of that

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time, because it's a little bit too late in the afternoon to start into some of the evidentiary matters, which we would not be able to complete this afternoon. And rather than break it up, we're going to take advantage of the time so the lawyers and I can do some work that we have to get done, and that will save you a lot of time sitting in that jury room doing nothing.

So you might as well go home, relax and enjoy and come back tomorrow. Let's have you back here at 8:30 in the morning. 8:30, second floor.

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Meet the bailiff downstairs at 8:30 and be ready between 8:30 and 9:00, as soon as we can get everybody together to get underway with some testimony.

Again, I caution you, please, it's totally important. Do not watch television, read anything

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in the newspapers, periodicals or listen to anybody, even family members or anybody, or discuss this matter. And above all, now that you know a lot more than you did when you started, do not reach any conclusions at all. I'm hoping you go home and just relax and save your strength for tomorrow, which will be a full day of testimony taken.

So enjoy your evening home, folks, and come back at 8:30 tomorrow, second floor, right here.

Thank you, folks.

(Thereupon, the jury was excused from the courtroom.)

THE COURT: Okay. Have a seat, folks, please.

I don't know what it is you want to take up, but for those in the audience who do not want to stay, why, you're free to go. For those who would like to stay and watch the proceedings, you're perfectly welcome.

All right. What is it that we have to discuss?

MS. ROSENBLATT: Well, our next two live witnesses are Dr. Julius Richmond, a former United States Surgeon General, tomorrow morning, and we provided the exhibit list, and then Dr. Ronald Davis on Thursday.

And one issue that's definitely going to come up, and perhaps Your Honor can consider it now, and in view of the opening statements, you know, we feel strongly, you know, to reargue this, the admissibility of the Surgeon General reports and the EPA report, because both witnesses are going to testify about those documents. And we'd like to

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argue at this time their admissibility, which is, in effect, a continuation of the argument of several days ago.

Now, Your Honor had indicated we could reflect the conclusions of those reports, and we feel they're clearly admissible under the Florida Evidence Code exception to the hearsay rule, judicial notice, and we feel based upon opening the door in opening statement, wide open as to those reports, that they should come in, and we'd like to have them come in through the next two witnesses.

THE COURT: Okay. You may argue the

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point, but --

MS. ROSENBLATT: Well, we had -- well, our position is very similar to the position -- the same position that we had before.

Under the Florida Evidence Code, and specifically 90.803(8), Public Records, "Records,

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reports, statements reduced to writing, or data compilations in any form, of public offices or agencies, setting forth the activities of the office or agency or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases, matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness."

And we argued, Your Honor, at the last hearing on this, and I don't have my memo in front of me, the specific provisions of the United States Code by which all of these reports are rendered, that there are actual observations and analyses that are made. This is not merely a compilation of materials. And we actually have the U.S. Surgeon General to identify and to talk about his participation, his review, and there's a group of 30 some odd scientists involved in each one, physicians and scientists, a large number of which are going to be -- I think five or six of each of these are going to be witnesses, expert witnesses for the plaintiff, and this is not merely a compilation; it's actual work done, and there are many drafts of it.

And I believe about 30 percent of defense counsel's opening statement was talking about these particular reports and the conclusions of the reports and the analysis of the reports and the criticism of the reports, the flaws of the reports.

We really feel that there's not much of an issue left in terms of the admissibility. We feel

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that if there was an issue based upon opening statement, and we even observed at that point and Your Honor indicated, well, the door is being opened, and we think it's wide open.

We have the reports here if Your Honor would like to see them. And it's clear that we feel under the Evidence Code, that they are admissible in any event but based upon opening statements that were made, they would clearly be admissible in this case, and we'd like to put them in through these two witnesses.

THE COURT: All right. One thing I want to know. This is the 1986 report?

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MS. ROSENBLATT: '86 with Julius Richmond; 1979 and 1980, when he was the United States Surgeon General. The '86 report he was involved in, as well; he has reviewed, he's familiar with. And the EPA report, both Dr. Davis and Dr. Richmond are very familiar with that report, and

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that's the one that was discussed previously. So we're talking about --

THE COURT: Did he have anything to do with preparing the EPA report?

MS. ROSENBLATT: The EPA -- let me just check through. I know a number of our witnesses do, and I'm not sure. Dr. Burns, Dr. Benowitz, Dr. Eatough, Dr. Hammond, who are --

THE COURT: You're bringing --

MS. ROSENBLATT: No. We're bringing them in. We're bringing those individuals in. No. He's very familiar, and Dr. Davis was familiar. Whether or not he's mentioned -- I'm not certain -- in one of the other aspects of it, but he's very familiar with the report.

THE COURT: Okay. Who wants to talk about this one?

MR. ROSS: I will, Your Honor. Go ahead.

MR. WHITING: Your Honor, if I may, Mr. Ross will address the legal issue, but I want to make sure -- in my opening statement, I did not refer or quote from the '79 Surgeon General's Report, the '82 Surgeon General's Report. I referred to the facts in the '86 Surgeon General's Report, and I referred to the 1992 EPA report, but, again, I did not quote from it. The only content of that report that I made reference to was the .19 relative risk.

THE COURT: Okay. Thank you. Yes, sir.

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MR. ROSS: Judge, I will avoid repeating the entire argument that we had for several hours on Thursday or Friday.

Let me start where Mrs. Rosenblatt finished. Dr. Richmond, whose deposition I took, I don't believe had anything whatsoever to do with the 1986 Surgeon General's report. He was not Surgeon General in 1986. The fact that he may have reviewed it and be familiar with it has absolutely nothing to do with its admissibility. I have reviewed it; I'm familiar with it, and that doesn't make it admissible.

To go back to where we are, plaintiffs' entire argument is based on 803(8). They claim that

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this is an exception to the hearsay rule. And I will remind Your Honor what we argued before, and the best way to do it is perhaps quote from Professor Ehrhardt's 1997 Edition, Florida Evidence.

THE COURT: What page are you on?

MR. ROSS: Where he says --

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THE COURT: What page?
MR. ROSS: I'm on Page 669, Dr. Ehrhardt's.
THE COURT: All right. Let me check it and see if I have the same edition.
I think I'm with you. Go ahead.
MR. ROSS: If you look at the last little paragraph, it begins on Page 669, he says, "A third kind of public record is admissible under Federal Rule 803(8)(c), but was intentionally omitted from Section 90.803(8) of the Evidence Code. Federal Rule 803(8)(c) provides for the admission of public records which set forth factual findings resulting from an investigation made pursuant to authority granted by law."
"The purpose of this provision in the Federal Rules is to provide for the admission of records and reports by a public official when the official is required to interpret and evaluate facts and information supplied by persons outside the agency."
We will go to the next page. On the middle of the page, Professor Ehrhardt goes on to conclude, "Records of a public body which rely upon information supplied by outside sources, or records which contain evaluations or statements of opinion by a public official, while within the public record exception to the Federal Rules, are inadmissible hearsay under the Evidence Code."
"In Florida, rather than offering this type

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of record, a witness must be called who has personal knowledge of the facts."
Those two paragraphs, in a nutshell, could not be more applicable to the reports we are talking about. The EPA report and the Surgeon General's reports are evaluations and comments on information and data supplied by people outside of the government.
It is very clear that the Legislature of Florida, passing the Evidence Code in this case, expressly determined not to adopt the provision of the Federal Rules that would allow these things to be an exception to the hearsay rule. And, therefore, by law, the Legislature in this State has deemed these to be the type of hearsay that cannot

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be relied on, unless it can be cross-examined in court, and that's what we can't do.

The fact that there was reference to these reports in opening statement by plaintiffs' counsel with the guidelines Your Honor said and an appropriate response by defense counsel in their

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opening statements as to why we would attack an expert who may rely upon these and may testify he's relying upon these has not in any way, shape or form opened the door to making inadmissible hearsay into admissible hearsay.

I think the rule is clear, this is not the type of public record that Florida allows, which, if you look over on Page 666, where Professor Ehrhardt says that what Florida allows as an exception is merely a record -- embracing records of a simple factual nature which focus upon the functions of a public agency.

So, in Florida if you want to put in an official act of an agency just to show that they took some sort of act, that would be admissible, but these kinds of, essentially, governmental opinions and evaluations of the work of private professions, of private agencies, is expressly prohibited by the difference between the Federal and Florida Rule.

THE COURT: Yes, ma'am.

MS. ROSENBLATT: The 1989 Surgeon General's Report. Ronald Davis, who was our expert on Thursday, was the scientific editor of that entire report. It was prepared by the Department of Health and Human Services under the general editorship of the Office on Smoking and Health, Ronald Davis, Director.

And I think it's very important that these types of reports that we're dealing with here, the

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EPA report, the Surgeon General's reports are much, much more, and I think it's clear from the defense opening statement, they're much more than simply compilations.

There were META analyses prepared. There were observations. There were drafts. There were 30 or more scientists. There were groups of people. There were a lot of hearings on these, Your Honor. And I think that defense counsel argued extensively, certainly with the EPA report, as to the contents of the report, as to what it should have had, what it did have, argued that what -- what it relied on wasn't really what it said it was. Talked about every conceivable aspect of the report. But I don't see how they can now take the position that this shouldn't come into evidence. They extensively --

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they went far beyond, saying our experts disagree with the conclusions reached in that report.

They went into the essence and what was in the report, and had we known that, we would have said -- because what they claimed in the report is not what's in the report. What's in the report is

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different from their analysis and what they described.

And I believe that since we have the experts that will be testifying as to each of these Surgeon General's reports, we have the U.S. Surgeon General that actually was involved in reviewing and drafting two reports, and we have Dr. Davis as to the '89 report, and we have five experts as to the EPA report, and since all of the experts are going to be discussing the reports, the report should come in. And it's not what was intended to be excluded by the rule. It's exactly what should be included by the rule, because there is primary research, primary analyses that are made, including the META analysis in the EPA report, where this is a far cry from some compilation of data.

THE COURT: Okay.

MR. ROSS: I don't know if Your Honor needs --

THE COURT: I don't think so. If the essence of hearsay is reliability, there can be no better indicia of reliability other than the fact that Congress has mandated that the Surgeon General's Report be printed on all tobacco products in one form or another, in essence, which would indicate to this Court the reliability of the thing.

The Court is aware of Federal decisions in which judicial notice has been taken of the Surgeon

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General reports in many cases. And I see no reason why I can't take judicial notice of that particular idea.

I also note that in Florida there have been cases in which judicial notice has even been taken of administrative aides to legislators in order to satisfy a query regarding legislative intent, and if that isn't hearsay, I don't know what else is.

So even under judicial notice, the Court is inclined to allow this into evidence. And I also think that the hearsay rule is inapplicable in this case.

I'm going to admit it in under a business record even of a governmental agency. I will take my shot. I'm going to do it, because this is different than any other case.

I don't think it's the intent of the

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Legislature to have incorporated, or even the Supreme Court, to incorporate this hearsay rule to cover this kind of a thing. If there -- if it comes to the test of reliability, especially since we're going to have people who were part of the Surgeon General's report themselves testify as compared to

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other people who are not, then I'm going to opt between the two areas of responsibility.

When two come into conflict, one of them has got to give. I'm going to opt in favor of the reliability of a report mandated by Congress.

Okay. That relates to the --

MR. WHITING: Your Honor.

THE COURT: -- EPA and Surgeon General.

MR. WHITING: Your Honor, I don't want to challenge the ruling. I understand the Court's ruling. My problem now is can we have a continuing objection --

THE COURT: Yes, sir.

MR. WHITING: -- so we don't have to object every time these are mentioned?

THE COURT: Yes, sir, you certainly can. And however it comes in, I think if one looks at it intellectually, I think the concept of intellect, in my opinion at this point, will fall on the side of letting it in rather than keeping it out.

All right. What else do we have to discuss?

MR. COFER: We're prepared to take up the Morgan deposition, the objections to the video, if you'd like.

But let me say one thing before we move on

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to that. It is true that Mrs. Rosenblatt gave me the exhibits for Richmond for tomorrow. She gave them to me this afternoon before lunch. I told Your Honor I thought the list was 160. After lunch, Mrs. Rosenblatt narrowed the exhibits to 56.

The point is I still now have a list of 56 exhibits that they say they're going to use with Dr. Richmond tomorrow that I haven't seen. It is true they're on the exhibit list.

In Dr. Richmond's deposition, which was taken in March, he was asked his opinion and the basis for his opinions and did not mention or allude to or rely on a single one of his exhibits.

So, two things: A, we were entitled to discovery with our deposition to the extent that he intended to rely on these in opinions that weren't disclosed. Second, there's a violation of the 48-hour rule, and we've been sandbagged.

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THE COURT: What do you want me to do? What is the end result?

MR. COFER: We should do one of two things. We should either not put the exhibits in, or we should defer putting on Dr. Richmond to take his deposition on the exhibits.

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THE COURT: Take his deposition on the exhibits?

MR. COFER: Well, to the extent they're going to change his opinion or bolster his opinion.

THE COURT: We don't know he's going to do that at all.

MR. COFER: We don't. We do know he gave a deposition in March and did not rely on the exhibits. Either he doesn't need them tomorrow for his testimony and they're going to try to use him to introduce exhibits not germane to his testimony. That being the case, I would suggest it's not fair, given the 48-hour rule, to spring this at the last minute.

So what I would suggest we do is we exclude the exhibits and we go with Dr. Richmond's testimony, which was originally contemplated.

THE COURT: Let me ask you a question. You knew what the exhibits were a long time ago, not necessarily these 58, but they are in the witness catalogue.

MR. COFER: Yes, Your Honor.

THE COURT: You should be familiar with each one.

MR. COFER: Except, Your Honor, there are literally thousands of exhibits. In terms of

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trying -- the whole idea of the 48-hour rule is so we can prepare sufficiently, so we can prepare our evidence to the jury for the Court's efficient administration and for the convenience.

And the whole purpose of the 48-hour rule is so it wouldn't come up just before a witness has been called and say, well, here, we've got a couple thousand exhibits, we're going to use these.

THE COURT: This was an unusual set of circumstances.

MR. COFER: Well, wait -- well, two points. One, counsel reminds me we did not have the exhibit list when we took his deposition.

Let me point out, this is not an unusual circumstance. I found out for the first time that Richmond would testify on Wednesday Saturday morning when I picked up the paper, because counsel told the press. So they knew they were going to call Richmond on Wednesday. They knew it at least five

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or six days ago.

We walked into your chambers Monday morning. We confirmed that Richmond would be the witness on Monday. And we said, "Where is the exhibit list? It was supposed to be faxed to me last night."

I talked with Mrs. Rosenblatt. She told me

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the ’79 Surgeon General’s Report and the ’86 Surgeon General’s Report. I said, "Fine."

Then she said, "There may be a few TI advertisements, editorials, whatever. I’ll bring them over in the morning." Great.

I show up in the morning. She has 160 exhibits, more than just TI, company exhibits, that I haven’t seen that have -- that we haven’t had a chance to examine Richmond on, and he’s coming in the morning. My point would be --

THE COURT: When is the 48 hours up?

MR. COFER: Yes. The 48 hours is up.

THE COURT: When?

MR. COFER: Well, if you call it --

THE COURT: When?

MR. COFER: We got it today, so you’ve got 48 hours from today, I guess.

THE COURT: Okay. What would you like to say about that?

MS. ROSENBLATT: Yes. I’d like to respond to that.

First of all, Dr. Richmond, in his deposition, was asked, "In what ways, based on your designation as an expert" -- it indicates that the tobacco industry was involved in suppressing and

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thwarting the public health officials’ movements to restrict smoking in public places.

"How is that done"?

He said, "Well, over the years I have seen a lot of press releases from the Tobacco Institute, from the various companies, denying the validity of the Surgeon General’s report, the EPA report. I had debated McNeil, Lehrer with the Tobacco Institute people, and they had constantly questioned the valid science, even when it was overwhelming."

I got together. I spoke to Mr. Cofer last night. In addition to the Surgeon General’s reports, I said, there are a number, which we are getting together -- they’re all the same. They’re all in the same category of Tobacco Institute advertisements, press releases, R.J. Reynolds and Philip Morris press releases, advertisements, basically saying the Surgeon General’s Report is not right, the EPA report is not right, challenging the fact that secondhand smoking causes disease.

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Every one of these 56 are in the identical same category. They're not going to be discussed in any length. They're all the secondhand smoke screen, passive smoking.

And when we meet with Dr. Richmond, when Stan meets with him before his testimony, we're

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probably, and I told Walt Cofer, there probably would be fewer than this, but we are going to show him, and the ones that he identifies, because he spoke generically about having seen these over the years, and they really are very, very similar -- they're all the same thing.

And this week was unusual about the 48-hour rule, but it's not as if we're talking about a lot of exhibits from a lot of different areas. They're all basically the same thing. They're a composite of the same thing, in essence.

THE COURT: These are actual articles?

MS. ROSENBLATT: These are all publications from the Tobacco Institute, the cigarette controversies. The Tobacco Institute put out booklets that he referred to in his testimony, advertisements and booklets.

THE COURT: Any other --

MS. ROSENBLATT: That's all we're talking about. Nothing other than that. They're all advertisements and booklets, how science and politics collide, things that he said basically set the public health officials back in terms of regulating smoking.

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THE COURT: Who produced those articles? That's what I want to know. Are they all from tobacco people or other people?

MS. ROSENBLATT: These are publications in newspapers and magazines. Plus these are Tobacco Institute -- they're all evidence that's marked, and they're all --

THE COURT: That's not my point. My point is you said some of them were products of some tobacco interests. Others are not, apparently.

MS. ROSENBLATT: No. They are all of tobacco interests. They're all from the tobacco companies, the Tobacco Institute.

THE COURT: That's what I want to know.

MS. ROSENBLATT: Yes. They're not anything other than that. Press releases from the Tobacco Institute.

THE COURT: From the tobacco?

MS. ROSENBLATT: Yes. There aren't actually any reports from television or anything like that. These are all publications from the

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tobacco companies.
THE COURT: That they generated?
MS. ROSENBLATT: That they generated, that are on their list, that they're familiar with. And I have them here, and I had them at lunchtime.
THE COURT: It's also the same

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documents that are on their list?
MS. ROSENBLATT: Some of them are, I believe. They've been on our exhibit list, and these are the ones that we filed with the Court previously --
THE COURT: All right.
MS. ROSENBLATT: -- in a three-volume set, but they're all on our list. I don't know --
THE COURT: They're on your list. Okay.
MS. ROSENBLATT: And they're all in the same category.
MR. COFER: Two quick reactions. The fact that they may use less than 56 doesn't do me any good, because I have to try to prepare for all 56.
Now, what it may do, it may make it less rancorous tomorrow when we're objecting on, you know, the ones they try to use. I mean, I can't tell you before what the argument will be because I haven't seen the exhibits.
But, tell me, what is a Surgeon General going to do talking about advertisements anyhow?

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They're hearsay.
THE COURT: I don't know.
MR. COFER: So they shouldn't come in on that basis alone.
But the point is, the whole idea of the 48-hour rule is we get these exhibits in advance. We know whether we have a problem with them. We bring them to the Court's attention, and this is going to be a long trial with a lot of witnesses and a lot of documents. We all agreed to the 48-hour rule, and Your Honor entered an order.
THE COURT: I'm just trying to figure out if we don't do that, that is, call Dr. Richmond, what are we going to do just to satisfy the 48-hour rule?
MS. ROSENBLATT: That's where the problem comes in.
MR. ROSENBLATT: Of course we don't have a back-up. Dr. Davis --
THE COURT: What is the purpose of these particular documents then with the testimony of Dr. Richmond?

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MS. ROSENBLATT: We could put them in independently. He did indicate in his deposition that based upon -- he could talk about it without actually putting them through -- in through him, and we'll put them in at a subsequent time in trial.

MR. ROSENBLATT: Or through another

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witness. After I have a conference with him, it could be down to 15.

All of the sudden, this 48-hour rule has a sanctity to it. We're telling him who the witness is. We're doing our best -- the truth of the matter is, until I meet with Dr. Richmond tonight, I'm not going to know -- obviously, we're restricted to the 56. I'm not going to go outside them, but it may be a lot less. But basically they're all from the Tobacco Institute.

THE COURT: I would really like to keep it within the confines of what we discussed, like the 48-hour rule.

MR. ROSENBLATT: I'm going to do my best.

THE COURT: We did talk about that earlier. Otherwise, we're going to run into the same problem every time there's a witness that comes up, and I don't want to do that.

MS. ROSENBLATT: We have a few of those that came in with no objection at opening statement, and we can have him identify -- they're in the same

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category. They're within this group, as well. We can show them as an example of what he referred to in his deposition. He said, "I don't have them here," and he just generically described them.

THE COURT: I'm not so sure that this is so prejudicial that it has to be dispositive of any issue at this point.

You haven't seen them. Go over them. Get familiar with what they are, and we'll see where it plays out tomorrow. Even if there is error, I'm not even really sure it's important error, or prejudice.

MS. ROSENBLATT: Okay.

THE COURT: All right. Let's try to proceed. I want to get this case going.

MR. COFER: Your Honor, so I'm to look at the 56. Is that your --

THE COURT: I would if I were you. I would. I'd read them all and get familiar with them. There's probably not that much difference between any of them.

MR. COFER: Let me ask you this. Since counsel thought they were going to narrow the list, could we maybe give them a time limit by which they

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can call me?
THE COURT: When are you going to talk to Dr. Richmond?
MR. ROSENBLATT: I'm going to meet with him tonight, Judge.
THE COURT: Tonight?

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MR. ROSENBLATT: At my office tonight.
MR. COFER: I will tell you what. In the spirit of compromise, here is the deal.
MR. ROSENBLATT: In the spirit of compromise, let's make it a 12-hour rule.
MR. COFER: In the spirit of compromise, I'll read the 56. I'd like for the future witnesses, that they abide by the Court's honor and agreement.
THE COURT: I agree with you there. I tried to do it. I thought we were going to be able to do that, but we got stuck on this particular one. I have to deal with it as it stands.
MR. COFER: So we have Dr. Davis coming up on Thursday. We don't have those exhibits either.
THE COURT: What about Dr. Davis?
MS. ROSENBLATT: Well, I already discussed with counsel, and I was working on it during lunch hour. Counsel for R.J. Reynolds, Mr. Furr, said tomorrow morning would be fine, and I

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would cut down the list that we had from our associates and make it less.
THE COURT: Let's be advised the 48-hour rule is supposed to be in effect. It cuts both ways. I really would like it to work. That was the reason for it, so we could avoid this kind of a problem. You don't want to get stuck with surprise witnesses and evidence, and neither do they. So it works both ways. And I really would like you to do it whenever possible.
MR. ROSENBLATT: Okay.
THE COURT: In an emergency situation, sure, we got problems. This is not necessarily an emergency. It's an unusual set of circumstances. Let's try to work it out.
If you can, counsel, when you talk to Dr. Richmond, if you can get in touch with counsel when you've made your decision and say, okay, look, we've cut it down to these 15 or whatever it may be, it may be of some help to him. Okay.
What else?
MR. COFER: I'm prepared, if plaintiffs are, to take up the issue of the objections to James Morgan's --

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THE COURT: Do you have a transcript of that?

MR. COFER: Yes, we do. I'll tell you what I have for you, if you'd like, is a transcript where we marked the page and lines we object to --

THE COURT: Yes.

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MR. COFER: -- as well as the schedule.
THE COURT: That will help.
MR. COFER: We marked in yellow page and lines that we objected to.
THE COURT: All right.
MS. ROSENBLATT: I have it marked. It's okay.
THE COURT: You really think we can get through this today?
MR. COFER: I think we can, because even though it looks like a lot of pages, most of the objections are based on a few grounds.
THE COURT: All right. Let's start from the beginning then. Okay.
MR. COFER: First objection, Page 9, Lines 5 through 12, attorney-client work product.
THE COURT: First of all, whose deposition is this?
MR. COFER: This was the deposition of the president/CEO of Philip Morris, Incorporated,

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James Morgan. This is the one you may recall we have a video deposition, the plaintiffs designated the entire deposition. We last night faxed our objections. My hope would be, once we get Your Honor's rulings, we can then take it to the video operator, have it edited so we can show it to the jury.
THE COURT: What's this?
MS. ROSENBLATT: We agree as to Page 9. There is a question but no answer, two objections. So, we agree as to Page 9 to have that out.
MR. COFER: Next objection.
THE COURT: Is this my copy that you are giving me so I can mark it?
MR. COFER: Yes. You can see also it's highlighted.
THE COURT: I see the highlights. Can I mark it?
MR. COFER: Yes.
I'm ready when you are.
THE COURT: What page?
MR. COFER: Page 34, Line 20 through Page 42, line 25.
MS. ROSENBLATT: We don't agree as to this.

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MR. COFER: Let me tell you what it is. It's relevance. This deals with -- Mr. Morgan left Philip Morris for a period of time, went to work at Atari. The reason plaintiffs want to put it in is because he got paid eight million dollars as part of a contract when he left. It has nothing to do with

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any issue of this case except it shows the doctor --
Mr. Morgan was well-compensated.
THE COURT: He made a lot of money and he'd do it all over again if he had the chance, he said.
MR. COFER: Not one word about cigarettes or ETS.
THE COURT: What is the significance?
MR. ROSENBLATT: He left Philip Morris, went to Atari, came back to Philip Morris. These pages, you know, go to his credibility, his devotion to -- basically to his credibility, Judge.
MR. COFER: Your Honor, all they show is that Mr. Morgan got paid.
THE COURT: I don't see how it goes to his credibility.
MR. ROSENBLATT: And his competence.
THE COURT: He went to a company that went under.

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MR. ROSENBLATT: And he got eight million dollars for it going under. We think that's interesting.
THE COURT: So what? I don't think it proves anything.
That goes all the way through what?
MR. COFER: That goes through Page 42, Line 25. And then, if you look at the next objection on Page 44 --
THE COURT: Wait. I haven't gone over this. Was he responsible for Pac Man? Is that what this says?
MR. ROSENBLATT: Yes.
MR. COFER: We'll stipulate he's responsible for Pac Man. We don't need to have it all on the video.
THE COURT: What is really the relevance and materiality with whatever he did with Atari if it has nothing to do with tobacco companies, cigarette smoke or anything else?
MS. ROSENBLATT: Well, it's a period of time, a gap of the time he was with Philip Morris, where he went, why he went there, what he did there in terms -- because he goes through his background of what he did and here's this, you know, flip side of this is why should they just selectively delete a

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portion of his background in terms of his competency as --

THE COURT: Because it's non-material, that's why. I'll sustain the objection.

MR. COFER: Next is the same thing. It's on Page 44, Lines 11 through 17.

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THE COURT: 44 --
MR. COFER: Do you have the letter, Your Honor, that sets out the grid of objections?
THE COURT: Well, that's all right. He just said he was in California with a new job.
MR. COFER: Well, he says Atari.
THE COURT: I have no problem with him going to Atari, coming back from Atari, but that whole litany of things --
MR. COFER: I did it only for consistency. That's fine.
The next block, Your Honor, starts at Page 47, Lines 12 through 25. You will note on the fourth objection on the letter that I handed to you what this all pertains to is Mr. Morgan's family, smoking history. We did not object to his personal smoking history. These were never questions about whether his wife smoked.

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THE COURT: Where is the objection?
MR. COFER: The objection is relevance.
THE COURT: Where in the transcript is it? I'm looking to see where somebody raised an objection.
MR. COFER: Well, all objections to relevancy were preserved. There was a stipulation. The only objections we had to make were to the question.
MS. LUTHER: It's the rule.
MR. COFER: Do you have a letter in front of Your Honor?
THE COURT: I don't have anything.
MR. COFER: Right here. See, if you will look at the objections, it sets out all the pages and line cites for the objections to help you follow through.
THE COURT: You mean this letter? Okay.
So, you are talking about his family's smoking habits.
MR. COFER: And I think it's worth noting we did not object to his personal smoking history, although I think that's a tangential relevance, but with respect to his wife's smoking history, his father's and mother's, that's irrelevant and invasion of privacy.

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THE COURT: It's his father's line of work and all that. What is the relevance of all this?

MS. ROSENBLATT: We think it's relevant in terms of credibility and generally in asking people who take a very strong position what their

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own smoking history and that of their families is.
THE COURT: What position is he taking? If he said smoking is terrible and will kill you but I let my family do it, yes, that would be relevant. In this particular case, he's saying smoking is not harmful.
MS. ROSENBLATT: "But my children don't smoke."
THE COURT: Maybe they don't chew either. I mean, I don't know. I don't see the relevance. That's the point. It has to be material and relevant to the issue. I mean, it's very interesting, but so what?
MR. COFER: Your Honor, next objection, Page 51, Lines 12 through 20 is privileged and work product.
THE COURT: How is that going to be

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attorney-client privilege?
MR. COFER: Well, because he's asking whether he'll come to trial if we ask him to. It's advice from his counsel, and we think he should be in trial. Why should they read that to the jury? If he doesn't then come to trial, the inference is counsel advised him not to come. It has no probative value. It invades the work product and the mental processes of counsel.
THE COURT: I don't think those are work product issues.
MR. COFER: And what is the relevance, I might add?
THE COURT: First of all, there is no answer.
MR. COFER: Which is even better reason to --
MS. ROSENBLATT: There's an instruction not to answer.
THE COURT: But there is no answer, so there's nothing he can say. All right.
MR. COFER: The next objection on Page 54, there's no answer. Counsel is making a statement.
THE COURT: There should be a question.
MR. COFER: So, that should be stricken.
MS. ROSENBLATT: There is an answer.

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It goes on -- what should be stricken is perhaps Mr. Hardy's comment, but there's a question and then he says, "Isn't that true that from then" --

MR. COFER: No. He says --

THE COURT: The question starts on Line 13, Page 54, and then when you get down to Line 24

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it says, "Please ask a question." And then the question, "Isn't that true," and the answer is, "What?"

And then the question on Line 3, Page 55 says that, From your standpoint, the difference between low tar and so forth, so that, apparently, is the question that was asked. The other one didn't have an answer to it.

So, I'll sustain that because it doesn't help. So, we start with the question on Page 55.

Now, we are down to Page 56.

MR. COFER: The next one, if you will turn, it's objection seven on Page 56, this is testimony about the financial worth.

THE COURT: Wait a minute. "How many cigarettes do they sell?"

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MS. ROSENBLATT: That's not financial.

MR. COFER: The point is that has no relevance except for the jury to adduce the financial condition of Philip Morris, which would only be relevant to punitive damages, and the amount is not to be determined in phase one and it's irrelevant and prejudicial.

MS. ROSENBLATT: I don't see how that is prejudicial.

THE COURT: Market share is what they are talking about.

MR. ROSENBLATT: Liggett gets up here and says they are a small company and has two percent of the market, and we want to show that, among the defendants, Philip Morris is the giant and they sell the most and Marlboro is the most popular cigarette. This is just basic information that's relevant.

MR. COFER: I'll stipulate that if Mr. Morgan says we are the smallest company at two percent, that Mr. Rosenblatt can read this portion of the deposition.

Counsel also reminds me under the Grace decision that this would not come in.

THE COURT: Where they stand in relationship to each other, just because they sell the most cigarettes doesn't necessarily mean they are making money. They could be selling the biggest cigarettes and losing --

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MS. ROSENBLATT: It's just about how many cigarettes they sell, just basic information about the company.

MR. COFER: Also, if you go on, they say Marlboro has thirty-three and a third percent of the market, it's the number one selling cigarette,

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it has no probative value in this lawsuit except to prejudice the jury to suggest this is a wealthy defendant, and it has --

THE COURT: One could put that on it too, but what is the reason for the question in the first place if not to establish the financial giant, so to speak?

Is there any other relevance?

MS. ROSENBLATT: It has nothing to do with finances.

THE COURT: But it mentions a position of a large corporation vis-a-vis a small person or a small company. For what purpose? It's got to have a purpose.

MS. ROSENBLATT: What was the purpose

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of talking about Maxwell House coffee and all the other products in opening statement? It was to talk about their company. This is just a basic fact.

THE COURT: For identifying purposes to identify who they are.

MS. ROSENBLATT: Defense counsel went into a lot of detail as to all the other products Nabisco sells.

THE COURT: What is the context?

MR. COFER: Well, Nabisco, of course, is not part of Philip Morris, and we did not say anything about what Nabisco sells. But this has nothing to do with the issues in phase one which are, does secondhand smoke on aircraft cabins cause disease in flight attendants.

MS. ROSENBLATT: It talks about the brands of cigarettes that it sells, which is certainly relevant to this case.

THE COURT: I don't think it's really material or relevant. Sustain it as to that. When you get into the issue of punitive damage, you can bring it back up, if you would.

MR. COFER: Next objection, Your Honor, objection eight, starts on Page 59. This is a relevancy objection. It's a reference to other lawsuits, the Philip Morris lawsuit against the Environmental Protection Agency, and has nothing to do with this case.

MS. ROSENBLATT: That's come in in two of the opening statements already, the fact that

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Philip Morris and the tobacco companies are suing the Environmental Protection Agency, and that's one of the things where Liggett said, We are not a party to that suit, that's just a fact that they say it's fraud and they are suing them.

THE COURT: It would also, in my mind,

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go possibly to prejudice, one way or the other on the part of the one of the defendants. If they are attacking the EPA report, they would have to do it for a purpose. And a reason, then, of their lawsuits would be probably a reason for them to attack it. I guess one could claim that would be relevant and material as to their position.

MR. COFER: If I may, Philip Morris sued the EPA. If you allowed this to come in and have a jury consider it, in essence we could be punished in the jury's mind for exercising our rights to try to vindicate our rights and --

THE COURT: That's one aspect, but the other is what is the motivation for denying what the

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EPA says? Is it the lawsuit or is it the fact that it relates to this case?

MR. COFER: Well --

THE COURT: It goes to credibility too.

MR. COFER: This case was filed long before the suit against the EPA.

THE COURT: That I don't know.

MR. COFER: Well, it's a matter of record, because the lawsuit wasn't filed until after the EPA report came out.

THE COURT: We'll see how far they take it.

MR. COFER: They don't take it very far here. I do think it comes up later on in the deposition, Your Honor.

THE COURT: Page 60, Line 10, the answer is, "From a business standpoint, my understanding is Philip Morris and others objected to the finding of the EPA based on several factors which we feel make the EPA conclusions invalid in comparison to the techniques by which they previously issued reports."

That's relevant.

MR. COFER: And there is no question, Your Honor, it will be clear why we object to the EPA report.

THE COURT: I don't think it's necessary to talk about whether they sued them. The question is do they object to the report. I think that's where the relevance comes in.

MR. COFER: And that's the basis of our

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objection:

MS. ROSENBLATT: Well, Your Honor, as part of the overall technique of challenging everything and fighting it, and there could be a question of their position here vis-a-vis what is going on there, and I think that's part of the

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evidence in this case, that's one of the things they do; they attack everything.

There's a whole history of litigation, of fighting everything that comes out. I think that's fair for us and our experts to testify about that. I don't think anyone is immune from reference to the fact that there's pending litigation, and I think that certainly goes to the issue of credibility when there is litigation ongoing now.

THE COURT: Where else does this come up?

MS. ROSENBLATT: It comes up, I think, briefly later on. I don't know exactly where it is.

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MR. COFER: Your Honor, I think this comes in with respect to questioning all the CEOs. It's a repetitive problem. But the point is it's going to be clear we -- we are going to tell the jury why we disagree with the EPA, and they can decide whether it's a good faith disagreement or whether it's tactical.

We should not be punished because we have exercised our constitutional rights as a plaintiff in taking that dispute to a court of law.

THE COURT: I agree with you. And whether you sue them or don't really isn't the issue. The question is whether you disagree with them. That's basically what the issue is.

MR. COFER: We disagree with them.

MR. ROSENBLATT: Although the lawsuit, Judge, is asking the court, federal court in North Carolina to remove the report. Now, it's germane also -- for example, it came up when the so-called documents of Brown & Williamson, they subpoenaed congressmen. There was a lawsuit about -- they have a constitutional right to do all those things, but in terms of our showing the big picture and the tactics and power and techniques they use, they sued the FDA, they sued the FDC, they sued ABC.

THE COURT: You are going to make that part of your conspiracy and fraud count?

MR. ROSENBLATT: Yes. As to how they intimidate with respect to going after raw data, that's why a lot of people who did these studies would not testify for us.

MR. COFER: Well, well, well --

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MS. ROSENBLATT: EPA witnesses will not testify because there's litigation pending. The fact of the litigation is very much a part of this lawsuit, and I think when there's existing litigation between a party and a third party and then they are attacking that third party's report, I

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think that's relevant in terms of the overall picture.

I don't see how they are entitled to some type of prohibition to hide from the jury the fact that they are litigating with the United States government or EPA report. I think that's relevant information for the jury to consider.

MR. COFER: Your Honor, no party, whether plaintiff or defendant or individual or corporation, should have to weigh whether they are going to exercise the right to seek redress in the courts by whether it's going to be used against them

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in some other forum.

It has nothing to do with the issues in this case. The fact is we have sued. That court will determine whether that's a meritorious suit. That will be decided in that forum, and it has nothing to do with here except it's designed to prejudice.

MS. ROSENBLATT: Well, Your Honor, let's assume that, for some reason, the flight attendants had sued the EPA, they didn't go far enough, they didn't talk about enough diseases. Could the defendants then -- would they accept the fact that we wanted to keep out of this lawsuit the fact that the flight attendants had sued the EPA? That would be laughable from their perspective. Of course they would bring it in. Why should they be immune when the shoe is on the other foot?

The fact that there's litigation in another agency that rendered a report here is highly relevant. It could also shed light on witnesses in this case. There may be witnesses in cross examination, "Isn't it true that you are testifying in the lawsuit against the United States government," and you know, contradictory statements in that lawsuit. I mean, that's part of this overall picture.

MR. ROSENBLATT: And it goes to Dr. Burns' testimony, for example, that if not for the techniques used by the tobacco industry, secondhand smoke would have been banned years earlier, and this is one of the devices. They sue people. They have a right to do it.

THE COURT: I understand that, but it crosses the line.

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MR. FURR: Your Honor, there are no witnesses in the EPA lawsuit. It's a challenge based upon the Administrative Code and it's an administrative record review. There are no live witnesses. The current posture of it is it's in a cross motion for summary judgment and under no

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procedure that one can contemplate will -- there will be no live testimony in that case.

THE COURT: I'm not so sure that cuts it in this case.

MR. COFER: I guess my point is with respect to Mr. Morgan, the plaintiff injected the EPA lawsuit through discovery. We didn't object and instruct because objections, of course, were preserved and we were trying to allow discovery as the court had ordered.

We resisted this deposition from the first

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instance, but once we were there, we didn't want to have to go back a second time. The fact we asserted our constitutional rights has nothing do with this case. The issue is whether secondhand smoke on planes causes disease.

THE COURT: Okay. The problem is that it could be relevant to motive and reliability and conflict that they may have with this issue of the EPA.

MR. COFER: Except we were defending the suit long before they sued the EPA.

THE COURT: Let me see what plays out further down the line. Let's mark that and come back to it, okay?

MR. COFER: Next one is No. 65.

THE COURT: That was Page 59 and 60. Wait one second. I just want to mark this so we'll go back and revisit that area.

65?

MR. COFER: Yes, Your Honor. It's just an editing issue because there was a question and no answer.

MS. ROSENBLATT: We'll agree that was repeated, the question.

I think this brings us to the EPA again. In fact, it does.

THE COURT: This is back where it started.

MS. ROSENBLATT: Which is brought up by the witness this time, and he started talking that that's what this lawsuit is about, the EPA lawsuit.

At Line 23, the witness starts talking about it, volunteers it.

MR. COFER: He didn't volunteer except

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to the extent it was already raised in the deposition and he was trying to be forthcoming to both the letter and spirit in which the questions were asked. It was after all discovery.

THE COURT: I'm going to let it in. He explains his answer, what it's all about. He makes

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a very definitive statement about it.

MR. COFER: Your Honor, I'm certainly not quarreling with your ruling. I just point out the only problem with letting it in on the basis that this was a fair explanation to the extent that that would apply to other CEOs that, for whatever reason, do not have the familiarity or did not give the full answer, you would only be left with the prejudicial effect with the jury knowing there was a lawsuit. See, that's my problem.

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THE COURT: I don't think so. I don't think it's going to have any effect. I think it probably stands in his better interest.

MR. COFER: The next area, Your Honor, is objection eleven. This goes to youth smoking. This was subject to a motion in limine.

THE COURT: Page where?

MR. COFER: Starts at Page 71, but you are better off to look at the letter, objection eleven.

THE COURT: 71, Line 24.

MR. COFER: It runs through --

THE COURT: Youth smoking.

MR. COFER: -- to the top of 73. This is the youth smoking issue that was subject to a motion in limine. Your Honor ruled it would not come in in opening statement. It has nothing to do with this case. It's a relevancy issue. Clearly any probative value to the extent you could even conceive of one is outweighed by the prejudicial effect and it should be excluded.

MR. ROSENBLATT: You know, Judge, this is very, very relevant on the issue of overall credibility. The tobacco companies say that all their billions of dollars of advertising are spent to get Marlboro smokers to switch to Camel and vice versa.

And when you point out to them the depths of smokers and the millions of smokers who quit and you say to them, well, obviously, like any business, you have to replace these people, don't you have some plan, they deny it. They flat out deny that they ever want to get a nonsmoker to become a smoker. And it's our position that that's an absurdity and it's a lie and this is in support of, look, the

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reality is the great majority of smokers start smoking when they are young.

THE COURT: What does that have to do with the issues in this case about secondhand smoke?

MR. ROSENBLATT: It goes to the other issue.

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THE COURT: Everything they do goes to credibility and reliability.

MR. ROSENBLATT: But it goes to the fraud issue. It goes to the lying issue.

THE COURT: This is why I don't like motions in limine because you make a decision in a vacuum before you find out what it's all about and then you have to reverse yourself on it.

MR. COFER: Your Honor, I'm not going

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to use this to try to bind Mr. Rosenblatt because I told him I wouldn't, but I think it does show how tangentially relevant or irrelevant this material is.

If you recall, Monday we were talking about youth smoking, Mr. Russ asked you for a clarification on the court's ruling on youth smoking and I said, well, it's going to come up in a very concrete way soon because the Morgan deposition -- Mr. Rosenblatt said you can take it out of the Morgan deposition.

I'm not suggesting he's bound by that comment. Certainly he's entitled to change his mind. But the point is, he wouldn't have said it if he thought this had anything to do with this case and it doesn't.

And you run into pages of this stuff at the back of the deposition. It goes on ad nauseum and also sloughs over the preemption because they try specifically to add materials that were post '69 that were clearly under Your Honor's ruling.

And I would suggest this has already become a pretty big case because of the plaintiff's insupportable theories of fraud, and there is no use in adding another layer of youth smoking that has nothing to do with flight attendants and airplanes.

MS. ROSENBLATT: Well, Your Honor, as we go through this deposition, there are some Philip Morris documents that were admitted -- well, that were identified and attached to this deposition as exhibits to this deposition which talk about exactly the opposite of what the CEO is saying which says let's go to high schools, let's find young smokers, and it's part of the overall fraud.

THE COURT: I'm not interested in the youth market issue. Really I'm not. I don't think

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it should be part of this case.
I'll sustain the objection.
MR. COFER: The next objection is objection twelve, Your Honor, on Page 79, and that's an attorney-client work product issue. Plaintiff's counsel were asking about the preparation efforts

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that Mr. Morgan's lawyers had made before the deposition, and there was an instruction and there was no answer.

THE COURT: There is no answer.

MS. ROSENBLATT: We'll agree to that.

THE COURT: Page 82 -- well, it starts at 81.

MR. COFER: The next one is

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argumentative and prejudicial. "How can you be proud to represent an industry where there are" -- it's argument.

THE COURT: Just a minute. Let me read the answer.

MR. COFER: There was an objection to the form of the question.

MR. ROSENBLATT: Telling me how proud he is to represent an industry where they sell billions of cigarettes which may, in fact, kill a half million Americans every year, he's not really sure but he's proud.

I say, "Well, how can you be proud, because you have just admitted that maybe it does kill all these people." What is there to be proud of that?

MS. ROSENBLATT: If you read through the few pages before, it's a follow-up question based upon his -- this is a hostile witness, and I think it's appropriate examination.

MR. COFER: There is no problem with the answer. There's a problem with the question. There was an argumentative question, a timely objection to the form. At that point, counsel is put on notice if he wanted to substantiate the testimony, he should have asked a non-argumentative proper question. He chose not to, and it should be excluded.

MR. ROSENBLATT: What Mr. Cofer wants to be kept in is that Mr. Morgan, who makes eight million dollars switching employers, is proud to be an American. He wants all that stuff in there, you know, his Americanism speech, but he doesn't want in there why he's proud to be CEO of the tobacco industry.

And if they just told me, Your Honor, that they will bring in Morgan on their case, I won't read the depo. If I get a commitment from them that

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they will bring in Morgan on their case where I can cross examine him, I won't read any of the video.

MR. COFER: Well, you are not going to get that commitment and you don't have that commitment. And the problem is if you didn't like this prior answer, you could have moved to strike

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it, but you didn't.
And if you actually look past the part where we object, you do follow up with the fifty million people who quit and then you get an answer.
My objection is to the argumentative nature of the question that we want excluded, not necessarily to the subject matter. And I think if

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you read the answers before and after that question, you will find that Mr. Rosenblatt gets the information in a more admissible form.
So, my objection is to the question. A timely objection to form was interposed, and it shouldn't be allowed.
MS. ROSENBLATT: We feel as a hostile witness, the most hostile of hostile witnesses, and we are allowed to lead and to ask this question as appropriate in the context of the questions before and after.
THE COURT: Well, whether he's proud of what he does or not is really not the issue, is it? You may think it is but --
MS. ROSENBLATT: He volunteered he was proud earlier.
THE COURT: That's what I'm trying to find. I didn't see that at the beginning.
MR. COFER: Actually, Your Honor, "proud" comes in at a part I haven't objected to.
THE COURT: He says he's proud of all the flag waving stuff.
MR. COFER: Proud to make informed choices, proud to choose to smoke or not smoke. So, to the extent that Mr. Rosenblatt wants that --
THE COURT: The type of question is an argumentative question if it wasn't based or preceded by something else. I agree with you. It isn't the kind of question that is normally asked without getting into argumentation.
We go on to, you know, if you pick it up on Line 14 --
MR. COFER: That's my suggestion, Your Honor. We just delete Lines 24 and 25 on Page 81.
THE COURT: Yes, I'll agree with that. The answer will come in. He talks about what it is, and even further down the line.
MR. COFER: The next one is objection

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fourteen.

THE COURT: Page 85.

MR. COFER: Page 85, I have testimony by counsel, no question pending.

THE COURT: Let's see.

MR. COFER: The part I move to strike

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is there was no answer -- well, I guess there was.
MS. ROSENBLATT: There was an answer on 19.
MR. COFER: Yes, there was. My objection is it's argumentative and mischaracterizes his testimony.

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THE COURT: "How can the average Joe on the street be informed about the health consequences when they hear you say maybe it does cause cancer, maybe it doesn't?"
That's a legitimate question. All right. Just cut out the colloquy.
Okay. What else?
MR. COFER: The next objection is colloquy on Page 89, no answer. You see the witness asked, "Can you state the question for me," and then Mr. Rosenblatt rephrased it.
THE COURT: Yes. Page 89, Line 16 rephrases.
MR. ROSENBLATT: Okay. We agree on that.
THE COURT: Sustained.
Page 93?
MR. COFER: Yes. This goes into advertising which we think is irrelevant and also may well be preempted.
THE COURT: I don't understand the issue of preemption there.
MR. ROSENBLATT: This goes to the credibility of saying that they take the position that no nonsmoker has ever looked at the cowboy in a Marlboro ad and said, boy, that's a good idea, I think I'll buy --
THE COURT: This doesn't have anything to do with the warning. It just has something to do with the image of the cowboy.
MR. COFER: Except it also goes to the extent it's challenging our advertising.
THE COURT: It has nothing to do with it.
MR. COFER: Clearly the last five lines have to come out under a prior ruling. They are talking billions of cigarettes and worldwide gross and all the money.
THE COURT: Let me see what the

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question is.

MR. COFER: See, the first question is what does Marlboro's advertising or any brand's specific advertising have to do with this case since, by definition, these people are all nonsmokers and then they are not affected by it.

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THE COURT: Starting with Line 5 through Line 10 -- well, let's see. Then you go on.
MS. ROSENBLATT: Well, there is no objections to anything other than Line 21.
MR. COFER: You know what? I would

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make an objection. I'd take that out too. If I missed it, I apologize. I'd take it all the way down through 11 on 95 because I do think it seems to track the same issues.
Before you get to the next objection, it just talks about sales, talks about advertising. The advertising is irrelevant, of course. The sales and quantity --
THE COURT: Let's slow down here. It's difficult to go into this. If we are not going to talk money, we really shouldn't at this point. Down through Line 20 should be out.
MR. COFER: I'll tell you what I'll do. I'll modify the letter to make --
THE COURT: That's okay. You start with the question on Line 21.
MR. COFER: That should come out because settlement gets in and you have already ruled, of course, that that doesn't come in. That's clear.
THE COURT: Yes. Now you talk about Page 95, Line 2.
MR. COFER: 95, 1 through 11 is what I have.
MS. ROSENBLATT: We have no problem with taking that out.
THE COURT: Okay. Sustained.
Page 97.
MR. COFER: The next objection, Your Honor, runs into the same basic issues. Those are questions about advertising, Virginia Slims, and that's a relevancy objection and also, you know, Virginia Slims wasn't even introduced until 1967.
THE COURT: What is the problem?
MR. COFER: Again, they are talking about the market share.
THE COURT: I don't see any problem with it.
MR. COFER: With excluding it or allowing it?

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THE COURT: In having it come in.
MR. COFER: The point is, Your Honor already ruled the advertising is irrelevant.
THE COURT: I don't think advertising is irrelevant. I think if you look at the reasons why they talked about it was because of a failure to

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warn. That's the only thing. So, I don't think it prohibits mention of advertising.

MS. WARREN: It does post '69, under the preemption ruling, they can't attack the warning

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that's on --

THE COURT: We are not talking about warnings. You are just talking about a statement about Virginia Slims and all that or whatever or show a picture of a cowboy or something.

MR. COFER: The point is, what does the advertising have to do with any issue in the case? The plaintiff can argue somehow we violated a duty to warn, and that's precisely what is preempted both under the labeling act, the Supreme Court's ruling and your ruling.

THE COURT: I don't think Cippilone goes so far. You can't come in and say that because there was a failure to warn is what they were saying, but to induce somebody to smoke a cigarette because of a pretty girl, does that have anything to do with Cippilone?

MR. WHITING: Your Honor, what would that have to do with this lawsuit, inducing somebody to smoke?

THE COURT: I'm not sure. I'm trying to figure out the relevancy of getting into this issue.

MR. COFER: Exactly. And it's a relevancy objection and the problem, of course, is if we inject advertising into the case, depending how this comes in, and we have to decide or respond to it in some way, it lengthens the trial, expands the witnesses and averts the jury's attention from the real issues which are --

THE COURT: I don't see what it has to do with anything.

MS. ROSENBLATT: This is part of his whole role with Philip Morris. He was involved in marketing and advertising. He was involved in campaigns in terms of what he does and what his role has been in the company.

THE COURT: If he didn't push a cigarette, didn't come up with an advertising campaign, he wouldn't be doing the job, he wouldn't be working; we all know that. That's what he does

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for a living. So, you talked about Virginia Slims
22 is a women's type cigarette. So what?
What does it have to do with smoke and
23 airlines?
MS. ROSENBLATT: It has to do with who
24 he is and what he does, and there's about a page of

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it, and I don't see where it's in any way
25 prejudicing the defense at all.
THE COURT: Sustain the objection.

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1 MR. COFER: Your Honor, the next
objection starts on top of Page 100 and, again,
2 that's in reference to settlement, and that's Line 7
through 14.
3 THE COURT: Yes.
MR. COFER: And I'll tell you the next
4 part, 15 through 21, is just irrelevant. It's
frankly not that big a deal.
5 THE COURT: Who is Jeffrey Bible?
MR. COFER: He's CEO of the holding
6 company. Like I say, it's not a big deal.
THE COURT: What does it tend to prove?
7 He talks to him every now and then.
MR. ROSENBLATT: You had given us
8 permission to take the deposition of Mr. Bible, but
they outsmarted us and prevented his deposition from
9 going forward.
MR. COFER: There's nothing
10 particularly prejudicial about it, but I thought we
would take it out to make a cleaner deposition.
11 THE COURT: I don't think it helps or
hurts.
12 MR. COFER: I didn't think it was
relevant, but I thought I would edit it.
13 THE COURT: It's interesting, but I
don't see where it's relevant. The only thing is
14 Mr. Bible, Mr. Webb, he was president and CEO of
Philip Morris International -- so what?
15 MR. COFER: The bottom line is it's not
prejudicial.
16 THE COURT: Let's cut it down. It
doesn't prove anything. Sustained. Okay.
17 Page 107, Line 9, this is questions about
insurance, outside counsel. Insurance, obviously,
18 doesn't come in.
MS. ROSENBLATT: We agree to that.
19 THE COURT: Okay. Sustained.
MR. COFER: Now, if you are ready, sir,
20 Page 110, there's a whole bunch of testimony that
goes on for about ten pages on Marlboro Friday, and
21 Marlboro Friday was very interesting. That was when
Philip Morris dropped the price of Marlboro, I

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think, twenty cents a pack and made a lot of interesting marketing, but it has nothing to do with this case and, yes, marketing strategy appeals to one brand and discount markets and has nothing to do with --

THE COURT: What is the relevancy of

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all this?
MS. ROSENBLATT: I'm just reading

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through the rest of it to see.
THE COURT: I mean, it's marketing.
MS. ROSENBLATT: Well, it gets into the issue of people staying loyal versus going to other brands in terms of the issue of addiction and what happened. It talks about nicotine.
THE COURT: I don't think it has anything to do with the issue in this case. I mean, it's very interesting to talk to these people about these things, but the whole idea of a deposition is to get information that you could use in a lawsuit. Background information is interesting, but I'll sustain the objection.
MR. COFER: That takes us to objection twenty-three, and this is just relevancy. Employees get free cigarettes.
MS. ROSENBLATT: What page are you on? You can continue on Page 119 where we went off on 118, Line 25. Then there's some talk about paying taxes to the federal government which, obviously, has no relevancy here.
THE COURT: We are going through the whole thing.
MS. ROSENBLATT: Page 119 is our objection. I just noticed something we would want out.
MR. COFER: We don't object to that. We'll let that in.
MS. ROSENBLATT: We'll take it out.
THE COURT: Whoa, whoa, whoa. "T" for time, because I'm not sure I'm up to speed with you here. We started this objection on Page 110, Line 13, and this carries all the way through to Page 111, 112, 113, 114, 115, 16, 17 and 18.
MS. ROSENBLATT: And it should go onto 19; it's the same topic. And what happened, though, is now the CEO is saying, "We pay so much money to the federal government in taxes," he's volunteering that. And of course, we want that out. That's part of that same discussion.
MR. COFER: I think that's something the jury might be interested in.
THE COURT: If they are interested in

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that, then I'm going to let in all the testimony about how much money you folks make.

MR. ROSENBLATT: I'll go for that trade-off in a minute.

THE COURT: So, that's out all through 119 down through --

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MR. COFER: 120, Line 21.

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THE COURT: Even the fact that he gives his employees a pack of cigarettes?
MR. COFER: You know, I think that would help us, but we are willing to let that go. I think it may distract the jury too much.
THE COURT: They get a whole carton a week free?
MR. COFER: We could probably get a carton down here for everyone.
THE COURT: All right. We'll go all the way down through Line 21. Wait a minute.
All right. I'm looking at the stuff you want out. I'm up to Page 124.
MR. COFER: That's just advertising expenditures. It has nothing to do with this case and it's prejudicial.
THE COURT: Okay.
MS. ROSENBLATT: I think it also includes money spent on those public service announcements.
THE COURT: I still don't see what it has to do with this matter. It's a company selling a product. We all know that, but so what? The question is whether or not cigarette secondhand smoke causes a disease.
129, "Do you have any statistics or does Philip Morris make any studies?"
MR. COFER: This, Your Honor, goes to, again, youth marketing. They ask how many kids drive by, see the billboards, do you have statistics, blah, blah, blah, blah.
THE COURT: I don't think any of this is necessary. Sustained.
Now we get into a real big one. I'm on Page 136.
MR. COFER: This is just relevancy and prejudice. This goes to things -- he asked about have you read Glantz' papers, The Cigarette Papers, have you read Ashes to Ashes, you know. And of course, those books are hearsay, one-sided critiques of the tobacco industry. They are not admissible in this case.
The books themselves are not admissible as hearsay, and this does nothing to resolve the issue

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in front of us here. It's not relevant. It's hearsay.

THE COURT: From 136, Line 4 through 139, Line 25?

MR. COFER: Yes, Your Honor. The next objection we have lost but -- well, no, this is the

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FDA lawsuit. This is the FDA lawsuit. We would again move to exclude --

THE COURT: Oh.

MR. COFER: -- we again move to exclude any reference to the FDA lawsuit. That clearly has nothing to do with this case whatsoever. It has nothing to do with flight attendants, secondhand smoke or airlines. It's again just an effort to punish us for exercising our constitutional rights to seek our rights in court.

MS. ROSENBLATT: Well, for the reasons we argued before, this has to do with regulatory powers of a federal agency, and we feel that it is relevant on issues.

THE COURT: Well, if somebody asked them, you don't want the FDA to regulate tobacco companies, I would say that's fine. But here you made reference to a lawsuit. So, in that context, if we are going to keep out other lawsuits, there is no way we can reconstruct the question.

The question at Line 2, Page 141 says, "Okay. And that has to do with they want to regulate the tobacco industry," so forth and so on, and they go through all that with colloquy, but we don't know that they are talking about the FDA at that point.

MR. COFER: Well --

MS. ROSENBLATT: We want to keep in starting with Line 22 because I think, in terms of that time line, you know, the tobacco industry showed through opening statement also all of the various FDA and various events that have occurred, but they omitted the fact that they sued these people and had litigation, and that could play upon the credibility of witnesses, bias and other issues, and I think that's part of the overall picture.

If they want a time line, make it an accurate time line. Litigation exists as well.

MR. COFER: Well, what the time line talked about was various measures pertaining to cigarettes that various government agencies had imposed. What this talks about is that we filed a lawsuit against the FDA; we are exercising our constitutional rights to go in court and have those matters determined in a court of law. We shouldn't

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be punished for exercising our constitutional rights.

The jury shouldn't be able to draw adverse inferences from the fact we went into court. We are asking the courts to consider issues where we think

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we are entitled redress.
MR. WHITING: Your Honor, I might add the issue of the FDA jurisdiction is what is at issue in that lawsuit and it comes -- I don't know precisely the date, '95 or '96 -- years after this lawsuit was filed. It would have no relevance to the issues of this case.
MS. ROSENBLATT: On Page 141, Line 14, there's a discussion based on congressional actions over the last 40 years by the witness, and I think if you are giving an accurate history and you are talking about public health officials, the tobacco companies, whether they cooperated, whether --
THE COURT: Let me just do this: I have a real problem getting Line 22 to Line 17 in because you are referring to a lawsuit. I really want to stay away from other lawsuits. But the question on Line 18 goes to the issue as to whether the branch of government is regulating anybody, and they say no, that's not correct, and they say who's regulating and they say the Federal Trade Commission, and they go through the whole business of who's doing it.
MR. COFER: We haven't even objected.
THE COURT: So, that's not even objected to, so that's fine.
MR. COFER: Our problem is with the FDA, Your Honor.
THE COURT: All right.
MS. ROSENBLATT: Well, they are saying they are being regulated by the Federal Trade Commission and these various agencies, and then they are trying to keep out the fact that they are litigating the FDA.
THE COURT: I realize that, but I'm trying to look at it in context with the case.
MR. COFER: But if you look at the FDA, the lawsuit and what we discussed, I won't repeat that.
The next question, which we have not objected to, plaintiff's counsel asked: "The tobacco industry never has been regulated by any branch of government or any governmental agency, has it?"
"Oh, that's totally an incorrect statement."
Well, then, who's regulating --

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THE COURT: I sustained the objection as to 140, Line 22, through 141, Line 17. I think we are just getting off-track, really.

MR. COFER: Your Honor.

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THE COURT: 142.
MR. COFER: The next objection, this is long, and I can tell you generally. I can just walk you through it. This goes on for quite some time.
THE COURT: Looks like they had a wonderful weekend.
MR. COFER: We start with the lobbying objection, which takes us to Pages 143, 144, 145 and 146 and 147, which is consistent with your ruling in limine that the issue of lobbying doesn't come in -- Noerr-Pennington and his project. That takes us through there.
Then when we get to 148, we run into a whole youth smoke issue again.
MS. ROSENBLATT: We totally disagree. We think, based upon opening statement of the defendants showing -- saying does this look like there is a fraud, does this look like anyone is being duped, we are working together in all these programs with the government, we are cooperating fully, you can't say that and at the same time be fighting, be suing, be lobbying and be trying to influence people.
I think they totally opened the door to all testimony referencing lobbying. And we are having that typed up. We will have it later today, the opening statements, but I don't think that they, that the defendants can suggest to this jury full, total cooperation, and they work together on programs, without showing what they were in fact doing at the same time. And I don't think it's protected.
MR. COFER: Well, actually---
THE COURT: I think you are all getting way ahead of me at this point. I haven't read this depo. You did. I am trying to look at this thing. The first thing I see is there was some wonderful weekend at Scottsdale in which dozens of members of Congress went at the behest of the tobacco company.
That's wonderful. Now, what?
MR. COFER: Well, we describe generally, if you look at Pages -- the bottom of 142 to 143, 144, 145, 146, 147, essentially, those are lobbying questions, lobbying documents, about petitioning Congress---
THE COURT: Let's see. Something about in what jurisdiction is the FDA being sued by---

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MR. COFER: It kind of---
THE COURT: This is North Carolina. Talking about Margiotta, Fertita and Wise as an

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agency -- what is that? Supervising the accounts? That doesn't have anything to do with anything. Then there is a lot of colloquy on Page 144.

MR. COFER: Right.

THE COURT: I am going to have to go through this line by line, trying to figure out what you folks are after. It's very difficult.

MR. COFER: The reason I characterized -- Your Honor is right. There's a lot of different things. If you look -- because the questions bounce around. The theme is, who is Philip Morris's constituency group, who are you talking to in Congress, was there this weekend in Scottsdale, and essentially that takes us now---

THE COURT: What about Myron Johnston? Who is he? What's that got to do with anything?

MS. ROSENBLATT: This was a document that we presented. Now, this objection is Page 142 through 212, so it's an enormous amount of pages and perhaps it would make -- I don't even have the documents here that refer to, you know -- it's the Philip Morris strategy in terms of how to get legislation through and fight legislation and how to wine and dine and how to go about this. And it was basically a company document, as I recall. I don't have it here. I know there is an objection to it. And there is so much of this that perhaps it would make sense for us to resume this tomorrow and get---

MR. COFER: Let me tell you what I am trying to do. There are objections that do go on for a number of pages. I have written them down by topic. This does take us down through lobbying.

Your Honor has ruled, with the Pennington decisions and the progeny, traditional lobbying doesn't come in. You made an exception for the 1994 Waxman hearings -- this has nothing to do with that -- with respect to opening the door in opening. That didn't happen.

What Mr. Hardy said, he told the jury, yes, we fought, yes, we fought regulation, but we fought fairly, that has nothing to do with our constitutionally protected right to petition government. And just like everyone else has, as you recall, when I think Mr. Whiting started saying "Just like the flight attendants' unions do," we got an objection.

The point is that's lobbying. That takes us

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through the bottom of 147. Once we get over that hurdle, we move into youth smoking, which I suggest

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will go more quickly.
MS. ROSENBLATT: I would like to have the transcript of some of the comments during opening statement to, you know---
THE COURT: I am still at a loss here because you are talking about, as she said, a tremendous number of pages. I am looking at this thing, and you have crossed off, starting at Page 142, all the way through 212 or something.
MS. WARREN: Your Honor, if I might just comment, this is the lobbying part that Mr. Cofer just referred to. Then there are a number of pages going through some company documents that deal with the youth smoking issue. That's why there are so many pages involved. At the end of it they go through some 1997 advertisements and start asking Mr. Morgan about the age of the models involved. So it's lobbying, youth smoking and advertising. That's all that's covered in those pages and we are objecting to all of it.
MR. COFER: What I was trying to do, and apparently I wasn't very clear, the lobbying objection goes from 142 through the bottom of 147. Once we have worked through that, starting at the top of the page, 148, and following along throughout, you run into youth smoking, nothing but a whole block of questions with youth smoking.
What I was trying to do was direct the Court to the lobbying basis of our objection so we could deal with that and then we could move on to the other basis, which is youth smoking.
Even if we didn't have a lobbying objection, if you look at it, it's not relevant. The fact that it's constitutionally protected seems to be like a good place to start.
THE COURT: Yes. You see, the problem is that this case isn't one of inducing people to smoke cigarettes to get sick. It's different. This may be fine for the Engle case, but certainly I don't think it has anything to do with this one.
I mean, I have a real problem getting into this issue of advertising your cigarettes, smoking, all that sort of thing, when the issue here is nonsmokers being affected by people who smoke on airplanes. So what? I mean, so maybe there are 16 billion people who smoke cigarettes.
MR. ROSENBLATT: But they wouldn't be smoking. They would not be smoking. Unless for all the devices and the advertising, there wouldn't be

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smokers on the airplanes. There wouldn’t be young

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smokers on the airplanes. That's the---
THE COURT: The issue here is not whether they are successful in their advertising. The issue is did they lie about the effects of the cigarette smoke, not whether they were successful in getting a market. The question is how did they commit this alleged fraud or misrepresentation.
MR. COFER: The problem is, if you get all these tangential issues and we have to respond, it really doesn't hurt the jury, prolongs the trial, and makes what's already a herculean task unmanageable.
THE COURT: That seems to be the bulk of what's left.
MR. COFER: Yes. That takes you all the way through 211. Then after that there are just a couple.
THE COURT: Let's bypass that issue until I have a chance -- maybe I can read it and see. I haven't read these pages.
MR. COFER: The only -- and it's not really a problem except to the extent that the more notice we have to get it edited consistent with the Court's rulings---
THE COURT: Well, I understand that, but if you want to---
MR. COFER: The next couple things, Your Honor, we have, if you get past that, that takes us really through---
Where does it take us through, Marty?
THE COURT: Well, the next one I have got is Page 212, Line 13. They mention in the question, "In addition to suing the EPA"---
MR. COFER: Forget that. We are going to edit that out. Forget that.
THE COURT: Then we get to Page 217.
MR. COFER: This was argumentative. The question -- and there was no answer. And it was rephrased. The question certainly -- on Page 217, the objection is that it's argumentative. In fact, most of these are questions and colloquy, and there was no answer.
MS. ROSENBLATT: We agree to that. That's not a problem.
MR. COFER: The next very short one, Your Honor, on 221, again goes to advertising costs.
THE COURT: Well, if you are going to be talking about five to seven million dollars as a budget, then you just talk about one page out of the New York Times, what difference---

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MR. COFER: I am giving that up, if I don't waive anything. It doesn't break my heart. I won't---

The next page is 224. That's just colloquy -- my partner, Mr. Hardy, and Mr. Rosenblatt, having a good time together.

THE COURT: All right. Page 245.

MR. ROSENBLATT: We had a good time somewhere?

MR. HARDY: That's what he's saying.

MR. COFER: I mean for you guys.

MR. ROSENBLATT: I never had a good time.

MR. COFER: I never had a good time with either of you.

245 to 246, CTR's tax status, I don't think it has anything to do with anything.

THE COURT: Okay. Sustained.

Okay. You want me to take a few minutes and read this section here to find out what we are talking about?

MR. COFER: Sure. Or if you would like, if you prefer to adjourn until morning---

THE COURT: You say you are going to have difficulty finding an expert.

MR. COFER: When do you want to show Mr. Morgan?

THE COURT: I don't want to read this tonight at home. I'll read it here.

MR. COFER: Okay. Read it here.

THE COURT: Relax.

MR. COFER: Sounds great.

(Thereupon, a short break was held, after which the following proceedings were had:)

THE COURT: Okay, folks.

MR. ROSENBLATT: You're a fast reader.

THE COURT: You learn in this business.

Most of the discussion is in advertising procedure, a lot of the advertising procedure relates to the youth market, and the last part of it, as I see, relates to whatever lobbying efforts one might describe as trying to impress certain legislators in Washington.

I really don't see the relevancy or materiality of any of it to our case and the issues in our case. I will sustain those objections.

MR. COFER: Thank you, Your Honor. That's all I have.

MS. ROSENBLATT: In view of the rulings, we are going to go through and possibly

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take out other portions as well, so we don't want it edited tonight, and we won't use it tomorrow. Then we would use it Friday -- I meant Thursday.

And tomorrow, I believe we have already designated Sandefur, Mr. Sandefur, the former CEO of Brown & Williamson, to read. So I want to make sure there's no other references to taxes and I just want to reread this night.

THE COURT: We are still within the 48-hour rule.

MR. RUSS: That's the problem. We got Sandefur designations this morning. We will have to go through and count designated---

MS. ROSENBLATT: Ed said there is no problem. Stan spoke to him.

MR. MOSS: What I said to Stan was we would be prepared to argue that tomorrow. That's exactly what I said to Stan. I didn't say that we would be prepared until we get your ruling, Your Honor.

THE COURT: I'm not sure I follow.

MR. COFER: I think I can solve the whole problem. I don't think there is another reference to the amount of taxes paid. If there is, we will take it out.

MR. ROSENBLATT: That doesn't solve---

MS. ROSENBLATT: There might be other portions that we're going to have deleted.

MR. ROSENBLATT: It's a different deposition now.

THE COURT: What are we talking about?

MR. ROSENBLATT: It's a different deposition now.

MR. COFER: Give us a little notice.

THE COURT: What do you mean, it's a different deposition?

MR. ROSENBLATT: Well, in terms of what we want to delete, what I may decide to do tomorrow or the next day---

THE COURT: You can delete anything you want.

MR. ROSENBLATT: I can delete anything I want. Right, exactly.

THE COURT: If they want to put it in, they will have a right to put in what they want.

MR. COFER: It will be the rule of completeness. What we would suggest is, rather than having them show a bifurcated part of a deposition and us do it later---

THE COURT: Here's the way it works.

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If they take out something that you wanted in that's material to the issue that we are talking about, in pari materia to the question, and in natural sequence follows as an adjunct to the question, yes, you are entitled to put that in. If it's a new area, new topic, whatever, you can put it in in your case later on down the road.

MR. COFER: That's fine. All I need is sufficient notice to look at that, make that judgment.

THE COURT: Anything material to the answer being given and in conjunction with it, you are entitled to put that in.

MR. COFER: Thank you.

THE COURT: Okay. Anything else?

MR. MOSS: No, sir.

THE COURT: Gee, I have 25 minutes left.

MR. MOSS: Unless you really like us and don't want to leave us.

THE COURT: I'm getting accustomed to your face.

MR. ROSS: Would you like us to reargue any of the ones---

THE COURT: If you want to reargue something -- I'm sure you do.

MR. COFER: Well, we have this decertification -- well---

THE COURT: I want Whiting to bring it up.

MR. WHITING: I understand your ruling.

THE COURT: I notice you are way in the back, two rows back.

MR. HARDY: Starting at 9:00 tomorrow?

MR. ROSS: He was thinking of asking the jury---

THE COURT: How about a non-jury case? Do you like that one better?

All right, folks. See you at 9:00 tomorrow.

(Whereupon, the trial adjourned at 4:35 p.m.)

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